Supreme Court, U.S.
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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DR. LEONARD JEFFRIES, JR.,

Petitioner,

v.

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH FLEMING
59 John Street
8th Floor
New York, New York 10038
(212) 385-8036
Attorney for Petitioner.

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Washington, D.C. • THIEL PRESS • (202) 328-3266

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QUESTIONS PRESENTED

1. Whether the principles enunciated in *Waters v. Churchill* with respect to the conditions under which the government, as employer, may punish an employee for speech, were properly applied by the Second Circuit Court of Appeals to *Jeffries v. Harleston, et al.* ("*Jeffries*")

2. Whether the Circuit Court erred in failing to balance the interests of the parties as required by *Pickering v. Board of Education.*

3. Whether, as a matter of law and considering the interests of the Petitioner in his First Amendment rights and his exercise of academic freedom, the Respondents met their burden of justifying their denial of Petitioner's Chairmanship in response to his speech.

4. Whether the Principle of "reasonable expectation" is without limitation or qualification with respect to time, circumstances and actual conditions known to the employer at the time an employee is punished for his speech.

LIST OF PARTIES

The appellee below, Dr. Leonard Jeffries, Jr., is the Petitioner here.

The following parties were appellants in the court below: Bernard W. Harleston, formerly the President of The City College of The City University of New York ("the College"); W. Ann Reynolds, the Chancellor of The City University of New York ("the University" or "CUNY"); and James P. Murphy, Edith B. Everett, Herman Badillo, Sylvia Bloom, Gladys Carrion, Louis C. Cenci, Michael J. Del Guidice, Stanley Fink, William R. Howard, Harold M. Jacobs, Thomas Tam, members of the Board of Trustees ("the Board") of the University.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. Background 3
2. The Trial 6
3. Court of Appeals' Decision Dated April 18, 1994 7
4. The Order of the Supreme Court Remanding the Case for Re-Consideration in Light of *Waters v. Churchill*. 8
5. The Court of Appeals' Decision dated April 4, 1995. 8

REASONS FOR GRANTING THE PETITION 10

I. The Deprivation Of First Amendment And Academic Freedoms Requires More Than The Mere Showing That There Was A Reasonable Expectation Of Disruption 11

II. The Application Of *Waters* To *Jeffries* Was Improper 15

III. Reasonable Expectation Requires Definition And The Establishment Of Parameters Not Examined By The Second Circuit And Not Set Forth In *Waters* 20

IV. First Amendment Rights And Academic Freedom Are Significant Rights Entitled To Great Weight 23

CONCLUSION 27

Page

TABLE OF AUTHORITIES

Cases:

Connick v. Myers, 461 U.S. 138 (1983) 12, 18, 19

Czurlanis v. Albanese, 721 F.2d 93, 3rd Cir. (1983) 14

Dambrat v. Central Michigan University, 1995 WL 328470 (6th Cir. Mich.) 16

DeJorge v. State of Oregon, 299 U.S. 353 26

First National Bank v. Bellatti, 435 U.S. 765 23

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 9, 23, 24

Konigsberg v. State Bar of California, 366 U.S. 36 (1961) 23

Luck v. Mazzone, 52 F.3d 475 (2d Cir. 1995) 15

NAACP v. Buttons, 371 U.S. 433 . . . . . 25, 26

Pickering v. Board of Education, 391 U.S. 563 (1968) . . . . *passim*

Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) 14

Rankin v. McPherson, 483 U.S. 378 (1987) 15, 17, 18

Shelton v. Tucker, 81 S.Ct. 247 24

Speiser v. Randall, 357 U.S. 513 26

Sweezy v. State of New Hampshire, 354 U.S. 234, 250 25

Tindle v. Caudell, 1995 WL 341529 (8th Cir. (ARK)) 16, 18

U.S. v. National Treasury Employee's Union, et al., 115 S.Ct. 1003 . . . . . 15, 19

Versarge v. Clinton, 984 F.2d 1359 (3d Cir. 1993) 14, 15

Waters v. Churchill, 114 S.Ct. 1878 (1994) . . . . . *passim*

Watters v. City of Philadelphia, 1995 WL 327127 (3rd Cir. (PA)) 15

Zamboni v. Stamler, 847 F.2d 73 . . . . . 14, 18

Other Authorities:

United States Constitution, Amendment I . . . . . *passim*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals about which review is sought is reported at 52 F.3d 9, and is reproduced in the appendix at 1a. The opinion of the court of appeals dated April 18, 1994, is reported at 21 F.3d 1238 (2d Cir. 1994) and is reproduced in the appendix at 50a. Those opinions and orders of the District Court, dated March 31, 1993, April 21, 1993, and May 11, 1993 are reported at 820 F.Supp. 736 (S.D.N.Y. 1994), 820 F.Supp. 739 (S.D.N.Y. 1993), and 820 F.Supp. 741 (S.D.N.Y. 1993), and reproduced in the appendix at 86a, 82a, and 76a, respectively.

JURISDICTION

The judgment of the court of appeals was entered April 4, 1995. This court has jurisdiction to hear this petition pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the First Amendment to the Constitution of the United States and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This case is about the denial of freedom, academic freedom and freedom of speech. It involves the right of a public employee to speak as a scholar and private citizen on matters of public concern, without fear of government reprisal. This case addresses the parameters of governmental response to the protected speech of its employees when individuals, acting on behalf of the gov-

ernment, disagree with the content of that speech. This case challenges the court to define whether and to what extent the government, as employer, is bound by time and circumstances when relying upon the affirmative defense of reasonable expectation of disruption, to justify punishing an employee in response to protected speech, and to define whether and to what extent the passage of time and existence of circumstances increases the government's burden, and reduces the weight of the government's interests in balancing the interests of the parties. This case is about the failure of the Court of Appeals to fulfill its duty and obligation to consider all of the facts, to determine and weigh the respective interests of the parties, and then to balance those interests *before* determining whether or not an employee is entitled to the protection of the First Amendment.

1. Background.

On July 21, 1991, the Petitioner, a tenured Professor of Black and Africana Studies at the City College of New York (the "College"), and Chairman of the College's Black Studies department (the "Department"), gave a speech (the "Speech") in Albany, New York at a Black Arts and Cultural Festival. The Speech was heard by several hundred people who gave the Petitioner a standing ovation at its conclusion, and was broadcast several times thereafter on cable television stations in the Albany area. No one disagreed that the Speech, which addressed curriculum reform in the State of New York and throughout the United States, dealt substantially with an issue of public concern. The issue is one that has aroused great emotion and controversy because it touches on race and ethnicity, inter-group relationships, the battle for control of the dollars and pedagogical direc-

tion of our public schools and the sometimes rough politics of the academicians involved therewith. Petitioner made the Speech as a private citizen speaking on matters of public concern, outside of the scope of his employment, at a time and place unrelated to his employment or his employer.

The Speech initially provoked thought and debate but not public furor, until cast in the light of anti-Semitism by a New York tabloid known for its penchant to fuel controversy and discord by misrepresenting and sensationalizing events.

Following the efforts of this tabloid the Speech became a political football, passed from one politician to another, from one talk show host to another, and finally to the Respondents' Board room.

The Speech was considered by some to be anti-Semitic, by others it was not. The opinions expressed in the Speech were considered by some to be improper, by others they were not. By definition then, the Speech became controversial, causing the Respondents to speak out against the Speech, to threaten the Petitioner, and later to examine whether the Speech had any impact on Petitioner's ability to function as Chairman of the Department or whether it had any disruptive impact on the Department, the College or the City University of New York (the "University"). This examination took place almost immediately following the Speech and was based on the Respondents' alleged fear or expectation of disruption. As a consequence of this examination, reports were generated by the Dean of the College Jeffrey Rosen (109a and 112a), and the College's Provost, Robert Pfeffer (114a). These reports concluded that Petitioner continued to function and to work with all elements of the College and University community. There was no

finding and no report of any failure, refusal or inability of any student, administrator or faculty member to work with the Petitioner in performing their respective duties related to the Department, the College or the University. In fact, prior to the Respondent's denial of the Petitioner's term as Chairman in March of 1992, the Faculty Senate of the College, comprised of Petitioner's colleagues, passed a resolution which disagreed with and condemned some of Petitioners Speech, but which stated, in no uncertain terms, that this group of Petitioner's peers and colleagues repudiated "as incompatible with academic freedom, any attempt, whether originating from inside or outside the College, to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views and called on those who may disagree with the substance of Professor Leonard Jeffries, Jr.'s views to challenge their accuracy and cogency in the free exchange of ideas." (122a).

On or about March 28, 1992, the Respondents voted to replace the Petitioner as Chair of the Department. They did so because they disagreed with the content of his Speech. At that time, eight (8) months following the Speech and on the heels of a media effort to make the Speech an every day issue, the Respondents had not been confronted with nor were they aware of any disruption to the Department, College or University, as a consequence of or caused by the Speech. At that time, the Respondents disagreed with the Speech but had no basis upon which to conclude that the Speech had been or would be disruptive. Following the Respondents action, as aforesaid, the Petitioner filed suit in the District Court.

2. The Trial.

At the trial of the matter, the Respondents testified that they removed the Petitioner because he performed poorly as Chairman and had engaged in undesirable acts. They also testified that the fallout from the Speech had a disruptive effect on the Department, the College and the University. This was their testimony but it was unsupported by any credible evidence whatsoever. In fact, on cross examination, Respondents' witnesses could not identify any disruption caused by the Speech. Nor, did they or could they provide any facts to justify any continuing expectation of material harm or disruption beyond March 1992.

When asked to identify disruption or harm caused by the Speech, the Respondent Chancellor Ann Reynolds could not (125a), nor could Respondent, President Bernard Harleston (127a). Moreover, Respondent Stanley Fink, a member of the Board, testified that the public response to the Speech was in reality no greater than the response of the public to other matters of public concern (131a).

The jury, therefore, concluded that all of the Respondents acted against the Petitioner in retaliation for his Speech (see response to Interrogatories #1 and #2, 76a), there being no other reason or explanation. This conclusion was supported by the trial judge and by the court of appeals on their review and assessment of the trial record. Of importance here is the fact that the jury, in response to Question #4 on Verdict Form #1 (77a) determined that the Respondents were motivated by a reasonable expectation that the Speech would cause disruption, but that six (6) of the Respondents acted with malicious intent to violate the Petitioner's First Amendment Rights or to unlawfully injure him with callous or reckless disregard of his rights. In agreeing to remove the Petitioner,

the nine (9) Respondents about whom the jury found no malice, relied exclusively on the information and recommendations of Reynolds and Harleston about whom the jury found malice (133a and 134a). They made no independent assessment of Petitioner's status, his performance or the impact of his Speech. They acted only to ratify the recommendations of persons whose goals were clearly to punish Petitioner because they disagreed with the content of his Speech.

3. The Court of Appeals Decision Dated April 18, 1994.

The Respondents appealed to the court of appeals seeking reversal of the District Court judgment or a new trial. The court of appeals denied the Respondents' appeal, affirming the jury verdict and judgment of the District Court except to the extent that it vacated the award of puntivie damages (75a), remanding for a new trial to determine whether the Petitioner should recover punitive damages. The basis of the remand was the court of appeals' concern over what it viewed as an inconsistency in the jury's verdict. The jury found, on the one hand, that Petitioner was entitled to punitive damages and it found, on the other hand, that the Respondents were motivated by a reasonable expectation that the Speech would cause disruption.

The jury Verdict Form #1, which contained the questions about reasonable expectation, referred to the Defendants' "actions" (77a) which, in the context of the trial, may in the jury's mind, have included the review of Petitioner's performance, the temporary limitation of Petitioner's term, and the ultimate denial of Petitioner's Chairmanship, *or*, it may only have included the former and not the latter. Nevertheless, the jury determined that

the act of denying Petitioner his term was malicious and that it was the Speech that motivated all of the Respondents' actions. The confusion develops because the jury found that nine (9) of the Respondents were without malice and that there was an expectation of disruption. This led the circuit court in its April 1994 decision to conclude that a new trial was necessary on the issue of damages as it could not reconcile this inconsistency.

4. The Order of the Supreme Court of the United States Remanding the Case for Re-Consideration in Light of *Waters v. Churchill.*

The Respondents filed a Petition for a Writ of Certiorari. The Petition was granted and the case was summarily disposed of with an Order (15a) remanding the case to the circuit court with instructions to reconsider, in light of *Waters v. Churchill.*

5. The Court of Appeals Decision.

On remand, the court of appeals requested and received letter briefs restricted to the issue of the applicability of *Waters* to *Jeffries.* (Reproduced in the Appendix at 16a, 28a, 36a, and 45a) The court of appeals reversed the judgment of the District Court and remanded with instructions to enter judgment for the Defendants (Respondents here) (14a). In its decision, the court of appeals reiterated its earlier conclusion that the Speech "squarely involved issues of public concern," but failed to identify and balance the interests of the parties.

The court of appeals did examine the impact of *Waters* and determined that the *Waters* "test" did not require that injury caused by the employee's speech be actual, but rather that "the government's burden is to

show that the speech threatened to interfere with government operations (9a). The circuit court further stated that it "read the *Waters* plurality opinion to hold that the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished" (10a).

The court of appeals established for itself certain parameters for review before determining, in light of *Waters*, whether or not Respondents had violated Petitioner's free speech rights. It concluded that Respondents did not violate Petitioner's free speech rights if:

"1) it was reasonable for them to believe that the Albany Speech would disrupt CUNY operations;

2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany Speech; and,

3) they demoted Jeffries because they feared the ramification for CUNY, or at least, for reasons wholly unrelated to the Albany Speech."

In conclusion, without evaluating the foregoing, the court of appeals reasoned that because nine (9) of the Respondents were motivated by a reasonable expectation of disruption in denying the Petitioner his Chairmanship, the Petitioner has not suffered a deprivation of his Constitutional rights.

The court dismissed the concerns of the University Faculty Senate, expressed in its Amicus brief (97a), that the application of *Waters* to *Jeffries* would be detrimental to the concept of academic freedom. The Court cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and stated that Petitioner was still a "tenured professor at CUNY and the defendants have not sought

to silence him or otherwise limit his access to the market place of ideas in the classroom."

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals has interpreted *Waters v. Churchill* as requiring judgment in favor of the government or employer, simply by the virtue of the existence, without more, of a reasonable expectation of disruption, thereby eliminating the balancing test required since *Pickering v. Board of Education*, 391 U.S. 563 (1968). It is important, not only that this Court confirm the continuing validity of *Pickering* and its progeny, but also that this Court provide some guidance as to the necessary components of the expectation and relative weight to be accorded to such components on the *Pickering* scale.

The decision of the Court below is inconsistent with the post-*Waters* decisions of this Court and the decisions of most other circuits which have considered First Amendment cases in light of *Waters*. Other decisions in the post-*Waters* era have continued to identify and weigh the interests of the employer *and* the employee, and to carefully weigh the components of those interests before reaching a conclusion as to the application of First Amendment protections to the employee's speech.

There is also the question as to whether *Waters* was meant to be applied to circumstances where the interests of the employee are so strong relative to free speech in the context of academic freedom, and where the speech in question, unlike *Waters* and others, occurs in a time, at a place, and under circumstances wholly unrelated to the speaker's employment or to the speaker's employer.

Finally, it is respectfully submitted, that the concept of "reasonable expectation" as interpreted by the Second Circuit, is vague, ambiguous and incapable of consistency, if expectation is not defined in terms of time and circumstances by this Court.

I.

THE DEPRIVATION OF FIRST AMENDMENT AND ACADEMIC FREEDOMS REQUIRES MORE THAN THE MERE SHOWING THAT THERE WAS A REASONABLE EXPECTATION OF DISRUPTION.

Waters v. Churchill, 114 S.Ct. 1878 has changed the face of the First Amendment as it affects free speech for public employees, and now, with the application of *Waters* to *Jeffries*, by the Second Circuit Court of Appeals, the face of academic freedom is threatened with near extinction. Notwithstanding the court of appeals' statement that Petitioner still maintains his position as a tenured professor and that he remains able to exercise a degree of academic freedom in the classroom, the fact is that Petitioner lost his Chairmanship, following a speech on academic and political issues, as a result of the Respondent's reaction to his Speech. As a consequence, every non-tenured teacher or scholar in this nation, employed by a public institution, is now chilled by this decision and subject to punishment as a consequence of his or her speech. This "chilling effect" is unparalled and unless narrowed by this court, the application of *Waters* to cases involving the expression of ideas based in academia, will close the door of the marketplace to those ideas finding disfavor with whomever happens to be sitting in the seat of power and authority at the time of the utterance. This has always been unacceptable, and should not be acceptable now.

In its decision, the court of appeals failed to do anything other than conclude that nine (9) of the Respondents had a reasonable expectation of disruption when they voted to deny the Petitioner his position as Chair.

This, without more, is not in compliance with the criteria established by *Pickering.* As *Pickering* is still good law, the circuit court's failure to employ the balancing test required by *Pickering* is fatal to the ability of its Decision to withstand scrutiny. The Second Circuit was required to strike a "balance between the interest of the employee, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Pickering*) Even though *Waters* added another dimension to the *Pickering* balancing test, it did not eliminate that test.

Just as the conclusion that the Petitioner's Speech touched substantially on a matter of public concern, does not alone afford the protection of the First Amendment, the conclusion that the government acted as a result of an expectation of disruption, is not of itself conclusive evidence that First Amendment protection may properly be withdrawn.

The government has the burden of justifying the discharge of an employee, and that burden varies depending upon the nature of the employee's expression, *Connick v. Meyers*, 461 U.S. 138. In meeting that burden, the government must give the court components beyond the mere belief of expectation to place as weights on the *Pickering* scale. The court of appeals made no effort to determine the interests of the parties and, therefore, made no effort to balance those interests. In *Waters*, this Court examined the facts and etermined the level and

potential disruptiveness of the employee's speech. In *Waters,* this Court's finding of potential disruption did not come about until after the court examined evidence:

1. That a potential employee may have been discouraged in working for a department in the hospital;
2. That the disciplined employee's complaints threatened to undermine management's authority; and,
3. That the employee stated that it wasn't possible to wipe the slate clean between her and her supervisors.

These factors apparently gave weight to the potential disruptiveness of the employee's speech in *Waters,* weight that tipped the scales in favor of the government.

It is clear, from *Pickering*, through its progeny, to *Waters* and beyond, that every case except *Jeffries*, has involved an identification or consideration and then a weighing of the interests of the parties, after it was determined that the speech in question was on a matter of public concern. In *Jeffries*, following the finding that the Speech indeed touched on a matter of public concern, the court of appeals paid only minor lip service to the balancing requirement detailed in *Pickering*, and then ignored it altogether.

The court of appeals never sought to identify or define the Respondents' interests. Had it done so, it would have weighed the only interest truly expressed by the Respondents, and that was the interest of the Respondents in preserving and imposing their views, as contained in the Respondents so-called "Mission," in place and in stead of any views held and expressed by the Petitioner. This was the disruption found by the Respondents. The expec-

tation of this type of disruption, real or otherwise, is entitled to very little weight on the *Pickering* scale. Moreover, the court of appeals, had it examined the Respondents' interests, would have been confronted with a reasonable expectation of only minor disruption based on the facts available to the Respondents, at the time they deprived Petitioner of his Chairmanship in response to his Speech.

This reasonable expectation of minor disruption, along with the expressed interest of the Respondents in imposing the idealogy of their "Mission," would have only been weights on the scales, not the dispositive factors the Second Circuit thought them to be. (*See Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979); *Czurlanis v. Albanese*, 721 F.2d 98 (3d. Cir. 1983); *Zamboni v. Stamler*, 847 F.2d 73). In comparison, the weights on the Petitioner's scale would include:

1. the public's interest in free and unhindered debate on an issue of public importance. (*Versarge v. Clinton*, 984 F.2d 1359) (3d Cir. 1993);
2. the public's right to be exposed to diverse and varied ideas;
3. the interest of the Petitioner in commenting upon matters of public concern; and
4. the interest of the Petitioner as a scholar and the interests of his colleagues in the unfettered exercise of academic freedom.

When a court is required to determine the validity of a restraint on free speech, it must arrive at a balance between the interests of the employee as a citizen in commenting on matters of public concern, and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees.

U.S. v. National Treasury Employee's Union, et al., 115 S.Ct. 1003 at 1012, quoting *Pickering.*

A finding of likely disruption must be based on some evidence and must be reasonable. See *Waters, Rankin v. McPherson* at 483 U.S. 378 and *Pickering.* Where likely disruptiveness is found, its components become factors to be reviewed and analyzed. Where the court fails to review and analyze the factors supporting the likelihood of disruption, it also fails to utilize the balancing test required by *Pickering* and reinforced by *Waters.* (*Watters v. City of Philadelphia*, 1995 WL 327127 (3rd Cir. (Pa)).

Here, the Second Circuit did not review and analyze the factors supporting the likelihood of disruption in order to determine their relative weight. The Second Circuit also failed to identify and analyze the factors on the Petitioner's side of the scale. This result is inconsistent with prevailing case law and should be reversed.

II.

THE APPLICATION OF *WATERS* TO *JEFFRIES* WAS IMPROPER.

In the case of *Waters v. Churchill*, the issues involved a government employee whose speech concerned or impacted her employment. Similarly, other cases preceding and subsequent to *Waters*, have all involved speech in someway connected to the employee's employment with the government. Most recently, the Courts have decided numerous cases citing *Waters,* including *Luck v. Mazzone,* 52 F.3d 475 (2d Cir. 1995), involving an employee of the State Court system; *U.S. v. National Treasury Employees Union*, 115 S.Ct. 1003, involving federal employees subject to the Ethics in Government Act; *Watters v. City of Philadelphia*, 1995 WL 327127 (3rd Cir. Pa) involving

an employee of the City of Philadelphia terminated from his employment for public criticism of a program of his employer; *Dambrat v. Central Michigan University*, 1995 WL 328470 (6th Cir. (Mich.)) involving a coach employed by a State university who used racially derogatory terms during a locker room session with his players; and *Tindel v. Caudell,* 1995 WL 341529 (8th Cir. (ARK)) involving a policeman who appeared at a public gathering attended by fellow officers, members of the policeman's organization, wearing a racially derogatory costume. Nearly without exception, the cases relate to speech or expression that have a nexus to government employment. Either because it involves criticism of the employer or its programs or policies, or because it is within the scope of the speaker's employment or, because it directly affects the speaker's colleagues.

In this case, the speaker, the Petitioner, made his Speech completely outside of and away from his place of employment, his employer and his colleagues. The Speech was not about or critical of his employer or of his employer's policies. He spoke as a private citizen on a matter of public concern before a like minded group, his words reaching the greater public only through the miracles of modern technology and without his participation. Under these circumstances, there is a real question as to whether it is legitimate to conclude that such speech, under such circumstances, can be the legitimate concern of the government.

Waters focuses on the government's interest in achieving its goals as effectively and efficiently as possible, at 1888. The goal of the government as employer is defined by the particular law that defines the tasks of the particular agency involved. None of the legitimate goals of any government agency involves the imposition of any particular ideology or philosophy.

Similarly, there must be a legitimate connection between the impact of the speech complained of, and the efforts of the government to perform its tasks. This does not, and should not include the mere receipt of angry letters and criticism from the general public or the media; although that is, in large part, the nature of the disruption feared by the Respondents. (See 128a, and 131a.) How much weight is such disruption worth, especially when compared to the need to preserve free speech and academic freedom, and in light of the circumstances under which the Petitioner, as a private citizen, made the Speech?

The application of *Waters* to *Jeffries* stretched the principals of *Waters* beyond the boundaries of the employer-employee relationship, crossing over into the realm of government as soverign where the ability to restrict speech is far more limited (*Waters* at 1988; *Rankin v. McPherson*, 483 U.S. 378 at 395; *Pickering* at 568). The question for this Court is how far the government can go in monitoring the speech of its employees in what is essentially their private lives. It is well established that no public employee sheds his or her rights simply because they become a public employee. Each public employee still has a private life that, even when known to the employer, should be off limits. Here, it cannot be disputed that the Speech did not affect the effective or efficient operation of the Respondents' enterprise. We only have the undefined concerns of the Respondents relative to fear of minor disruptions and conflicts in viewpoints and idealogy. All of the foregoing must lead us to the conclusion that the Respondents had no basis upon which to act and that the Second Circuit failed to consider all of the relevant facts before stretching *Waters* to cover *Jeffries*.

This case is not a public employee case in the same sense as all of the others. If *Waters* is intended to cover a case in which the only real issue is a conflict in idealogy not affecting the ability of the employee or the employer to function, then *Waters* can be used to provide the government as sovereign with the same powers it intends to give the government as employer, and that is contrary to all of the applicable case law.

"The balancing test articulated in *Pickering* is truly a balancing test. (*Zamboni v. Stamler,* 847 F.2d 73). It is intended to require an examination of the interests of the speaker versus the interests of the government in the effective and efficient fulfillment of its responsibilities to the public. *Connick v. Meyers,* 461 U.S. 138. The interrelated factors used by the Courts in weighing the competing interests of the employer and the employee are:

1. the need for harmony in the office or work place;
2. whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
3. the time, manner, and place of the speech;
4. the context in which the dispute arose;
5. the degree of public interest in the speech; and
6. whether the speech impeded the employee's ability to perform his or her duties.

Tindle v. Caudell, 1995 WL 341529 (8th Cir. Ark).

The test is intended to determine whether the speech undermines the effective functioning of the public employer's enterprise. *Rankin v. McPherson.* Under

Waters, this hasn't changed. Indeed, since *Waters*, this court, in its opinion in *U.S. v. National Treasury Employees Union, et al.*, has reaffirmed the principles of *Pickering* and *Connick*, stating that "where . . . government employees seek to exercise their rights as citizens to comment on matters of public interest . . . the government *must* be able to satisfy a balancing test of the type set forth in *Pickering.*" Citing *Connick* at 1007.

If the government *must* satisfy a balancing test, then the Courts must consider the factors comprising the weights on the scales. These weights on the Respondents' side would include their concern about their "Mission" and their concern about the effect of the Speech on the future effectiveness of their operation. (In fact, the Department, the College, and the University prospered following the Speech, experiencing record increases in enrollment and funds from private sources. The downside for the University occurred at the hands of the legislature and the Executive Branch through budget cuts and tuition increases, which affected the entire CUNY system.[1]) What weight would these factors have? If we exercise these interests in light of the interest of the Petitioner, we must conclude that they carry very little weight and that the scale would have, necessarily, tilted in favor of Petitioner. To look forward at its reasonable expectation of disruption, the Respondents would have to first look back to find real circumstances upon which to base their fear. In so doing, the Respondents, as of March 1992, would have found that following the Speech, the level of efficiency and effectivenss in the workplace had not been materially affected by the Speech or its aftermath. The decision of the Second Circuit should be reversed.

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[1]Source: City University of New York, as reported by the New York Times, January 9, 1994.

III.

REASONABLE EXPECTATION REQUIRES DEFINITION AND THE ESTABLISHMENT OF PARAMETERS NOT EXAMINED BY THE SECOND CIRCUIT AND NOT SET FORTH IN *WATERS*.

The Respondents have relied upon *Waters* and its acceptance of reasonable expectation as the basis for justifying government action based on the speech of an employee. What *Waters* failed to do was to provide the lower courts with some guidelines as to the parameters of the application of its principles. In *Jeffries*, the Respondents took decisive action against Petitioner eight (8) months after the Speech and following numerous investigations and inquiries designed to find some link between the Speech and some disruption in the workplace. After eight (8) months, the Respondents could not show that the Speech had impacted, in any way, on the ability of the Petitioner, the Department, the College or the University to effectively and efficiently function. Notwithstanding this reality, the Respondents, collectively, on the recommendation and at the insistence of Respondents Reynolds and Harleston, removed the Petitioner from his position as Chairman.

After a trial, during which the Respondent produced no evidence of actual harm and no evidence of a reasonable expectation of disruption as of March of 1992, we are confronted with a series of jury responses in support of its verdicts in favor of the Petitioner, which appear to be contradictory. In light of *Waters*, the Second Circuit has construed the contradiction in Respondents' favor and has determined that Respondents are entitled to judgment without the benefit of a new trial. The Respondents, therefore, are provided with the benefit of enjoying the luxury of the new parameters set by *Waters*,

without having been burdened at trial with the requirement that they prove the elements of their expectations of disruption. On the other hand, the Petitioner is burdened with the disadvantage of not having had an opportunity to hear and fully respond in the factual record to Respondents' now dominant position, to wit, that it acted based on a reasonable expectation of disruption. The position Respondents now rely upon was developed after the fact, following the April 21, 1993 Order of the District Court (82a) which determined that the Speech was protected and not subject to dissection to have its parts selectively presented out of context. Prior to that time, the Respondents' position was that the Petitioner was removed because of the Speech, because of its impact, and because he performed poorly as Chair. Little, if any, testimony at trial dealt with anything else. No testimony or evidence was presented regarding the Respondents' reason for removing the Petitioner from his Chair in March of 1992. Although it was clear to the jury that the removal was in retaliation for the Speech, the Respondents' witnesses testified that the March 1992 vote had nothing to do with Petitioner. (See Fink testimony 133a and Carrion testimony 134a.)

Now, thanks to the intervening *Waters* decision and the apparently inconsistent jury verdicts, Respondents have the benefit of an affirmative defense handed to them which they did not have the burden of having to prove at trial. As a consequence, Respondents should not be afforded the opportunity to take advantage of any presumption of validity or weight in the *Pickering* balance test. Such a presumption is unfair and unjust to an employee, and gives the employer an unfair advantage. So, too, does the absence of some limitation or sliding scale on the impact and weight of the expectation when it is applied to justify an act occurring some eight (8)

months after the Speech and following a factual history that neither supports nor justifies anything but an expectation of the most minor of disruptions, almost exclusively limited to what amounts to public relations responses. Responses that have no real impact on the ability of the Respondents to effectively achieve the goals of the public institution they are charged with operating.

The courts should be subject to some guidelines that recognize that expectation cannot last forever. That, at some point, they must give way to reality. This is especially so when the employer, for whatever reason, does not act quickly following the employee's speech. As time goes on, the weight of the expectations must, of necessity decrease, as experience and practice provide the public employer with a true understanding of the impact of an employee's speech.

According to the language in *Waters*, an employer is required to "act on the facts as it reasonably finds them to be and as it in good faith finds them to be." The courts, in employing the *Waters* principal and the *Pickering* balance, must also be mindful of what the facts were as the employer found them to be. The Circuit Court failed to do this and took a one-two approach, determining first, without foundation, that the Respondents acted exclusively out of a reasonable expectation of disruption and then concluding immediately, without weighing or balancing the interests that this entitled Respondents to judgment in their favor.

IV.

FIRST AMENDMENT RIGHTS AND ACADEMIC FREEDOM ARE SIGNIFICANT RIGHTS ENTITLED TO GREAT WEIGHT.

The First Amendment is the foundation of all of our freedoms. It is intended to protect our ability, even as public employees, to participate as full citizens in the rights and priveleges available in America. In particular, speech on matters of public concern is that speech which lies at the heart of the First Amendment's protection. *First Nat. Bank v. Bellatti*, 435 U.S. 765, 776. Unlike the doctrine created by *Waters*, the doctrine supporting the First Amendment has a long and steady tradition.

"The very object of adopting the First Amendment was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence. . . . The creation of 'tests' by which speech is left unprotected under certain circumstances is a standing invitation to abridge it." J. Black dissenting; *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). Justice Black's dissent rings familiar in the *Jeffries* case.

We do not believe that the First Amendment is absolute, but the point Justice Black raises about weak balancing tests leading to significant abridgement of the Bill of Rights is certainly a valid one.

The court of appeals in *Jeffries* has taken an additional step beyond *Waters* and created a test without balance and a level of uncertainty for government employees, particularly in the academic arena. The Court in *Keyishian v. Board of Regents*, described this as a "highly efficient in terrorem mechanism," stating, "It would be a bold teacher who would not stray as far as possible from

utterances or acts which might jeopardize his living. . . . The result must be to stifle that free play of the spirit which all teachers ought especially to cultivate and practice." That has been the result here where the court of appeals has all but ignored the weight of academic freedom by failing to balance the interests of the parties.

The courts have rarely been persuaded by arguments of significant state interest when weighed against the restraint such practices placed on fundamental freedoms. The Court in *Keyishian*, although recognizing the legitimacy of the state's interest in protecting its educational system, stated "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents*, 87 S.Ct. 675, 385 U.S. 589 (1967) citing *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (19___). Just as regulations must be narrowly tailored to serve the objective of government without intruding unnecessarily into the rights of the individual, so must the test utilized in balancing the goverment's interest in effectively carrying out its mission be narrowly read.

In balancing the government's interest against that of teachers and educators, the Courts have been especially vigilant in the area of academic freedom. When academic freedom is at issue, the scale must be heavily weighted in favor of the dissemination of ideas, and open discourse. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is, therefore, a special concern of the First Amendment." *Keyishian*, 87 S.Ct. 683.

"The essentiality of freedom in the community of American universities is almost self-evident. No one should under estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. . . . Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding: otherwise our civilization will stagnate and die."

The issue before this Court is not simply a single individual scholar's right to express his learned viewpoint, balanced against the government's interest in maintaining its tranquility. It is the Nation's future. It is the right of the people, our future leaders, "to be exposed to an exchange of ideas which discovers truth "out of a multitude of tongues." *Keyishian* citing *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250.

This fundamental right, when balanced against a low standard such as the mere possibility of disruption, must triumph. "First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian* citing *NAACP v. Buttons*, 371 U.S. 433. The government cannot accomplish, through the back door, what it cannot do through the front. The legislature could not enact a statute which makes it unlawful for a teacher, public employee, etc., to engage in a public speech on a matter of public concern which individuals acting on behalf of the government, simply believe would be disruptive to the goals of the employer. Such a statute would be stricken as being extremely vague and unconstitutional. Yet, this is the end result of the court of appeals' holding in *Jeffries*.

"When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." "For the threat of sanctions may deter almost as potently as the actual application of sanctions." *Keyishian*, at 87 S.Ct. 675 at 684, citing *Speiser v. Randall*, 357 U.S. 513 at 526 and *NAACP v. Button*, 371 U.S. 433.

"The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Keyishian, Id.*

The Court has repeatedly reasoned that the greater the importance of safeguarding the overthrow of our institutions "the more imperative is the need to preserve inviolate the constitutional rights of free speech . . . in order to maintain the opportunity for free political discussion." *Keyishian* citing *DeJorge v. State of Oregon*, 299 U.S. 353.

This reasoning is lost in the decision of the court of appeals and, as a consequence, threatens the very foundation of free speech and academic freedom.

The restriction of speech viewed in the short term may give the impression of being advantageous to society's goals. However, the net result often is the undercutting of the democratic process. This is particularly the case when viewpoints seeking to enter the "marketplace of ideas" are turned away at the gate.

CONCLUSION

FOR THE REASONS STATED HERE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JOSEPH FLEMING
59 John Street
8th Floor
New York, New York 10038
(212) 385-8036
Attorney for Petitioner.

Dated: New York, New York
July 3, 1995

Supreme Court, U.S.
FILED
JUL 3 1995
OFFICE OF THE CLERK

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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DR. LEONARD JEFFRIES, JR.,

Petitioner,

v.

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH FLEMING
59 John Street
8th Floor
New York, New York 10038
(212) 385-8036

Attorney for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 328-3286

138pp

APPENDIX

Page

Appendix A – Judgment and Opinion of the United States Court of Appeals for the Second Circuit Dated April 4, 1995 . . . . . 1a

Appendix B – Order of the Supreme Court of The United States Dated November 14, 1994 . . . . . 15a

Appendix C – Plaintiff-Appellee's Letter Brief Dated January 13, 1995 . . . . . 16a

Appendix D – Defendant-Appellant's Letter Brief Dated January 13, 1995 . . . . . 28a

Appendix E – Plaintiff-Appellee's Letter Brief Dated January 17, 1995 . . . . . 36a

Appendix F – Defendant-Appellant's Letter Brief Dated January 17, 1995 . . . . . 45a

Appendix G – Judgment and Opinion of the United States Court of Appeals for the Second Circuit Dated April 18, 1994 . . . . . 50a

Appendix H – Order of the District Court, Southern District of New York, Dated May 11, 1993 . . . . . 76a

Appendix I – Order of the District Court, Southern District of New York, Dated April 21, 1993 . . . . . 82a

Appendix J – Order of the District Court, Southern District of New York, Dated March 31, 1993 . . . . . 86a

Appendix K – Verdict Form #3 . . . . . 93a

Appendix L – Amicus Letter Brief of City University Faculty Senate 97a

Appendix M – Memorandum dated September 19, 1991 from Dean Jeffrey Rosen to Provost Robert Pfeffer 109a

Appendix N – Memorandum dated October 2, 1991, from Dean Jeffrey Rosen to Provost Robert Pfeffer. 112a

Appendix O – Memorandum dated October 4, 1991, from Provost Robert Pfeffer to President Bernard W. Harleston 114a

Page

Appendix P – Minutes from the September 19, 1991 meeting of the Faculty Senate of City College 122a

Appendix Q – Excerpts from Transcript of Testimony of Chancellor Ann Reynolds – Cross Examination. 125a

Appendix R – Excerpts from Transcript of Testimony of President Bernard Harleston – Cross Examination. 127a

Appendix S – Excerpts from Transcript of Testimony of Trustee Stanley Fink – Cross Examination. 131a

Appendix T – Excerpts from Transcript of Testimony of Trustee Gladys Carrion – Cross Examination 134a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1993

No. 953

(Argued: January 21, 1994
Decided: April 18, 1994
Vacated: November 14, 1994
Decided: 4/4/95)

Docket No. 93-7876

LEONARD JEFFRIES,

Plaintiff-Appellee,

v.

BERNARD HARLESTON, individually and in his official capacity as president of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Defendants-Appellants,

BLANCHE BERNSTEIN,

Defendant.

Before: VAN GRAAFEILAND and McLAUGHLIN, *Circuit Judges,* and BURNS, *District Judge.*

In *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), we held that a city university could not fire a non-policymaking employee for speaking on issues of public concern unless the speech actually disrupted government operations. *See* 21 F.2d at 1245-47. Subsequently, in an unrelated case, a plurality of the United States Supreme Court indicated that the government could fire such an employee based on a reasonable prediction that the speech will cause disruption. *See Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 1887, 1889 (1994) (plurality opinion). The Supreme Court then vacated the judgment entered in *Jeffries*, and remanded to us for reconsideration in light of *Waters*. *See Harleston v. Jeffries*, 115 S. Ct. 502, 503 (1994) (memorandum).

We now reverse the judgment of the district court, and remand with instructions to enter judgment for the defendants.

REVERSED and REMANDED with instructions to enter judgment for the defendants.

Kathie Ann Whipple, Acting Bureau Chief, Office of the Attorney General of the State of New York (Dennis C. Vacco, Attorney General of the State of New York, of counsel) *for Defendants-Appellants.*

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*Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

Joseph Fleming, New York, NY, *for Plaintiff-Appellee.*

Sheldon D. Camhy, Camhy Karlinsky & Stein, New York, NY, *for amicus curiae Anti-Defamation League.*

Kenneth S. Stern, Samuel Rabinove, Wendy Lecker, Penina Goldstein, New York, NY, *for amicus curiae The American Jewish Committee.*

Arthur L. Galub, New York, NY, *for amicus curiae University Faculty Senate.*

Henry Mark Holzer, Karen Johnson, Brooklyn, NY, *for amicus curiae The Individual Rights Foundation.*

McLAUGHLIN, *Circuit Judge*:

In *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), we affirmed the district court's judgment that 15 university officials violated the First Amendment rights of a professor, Leonard Jeffries, by reducing his term as a department chairman because of a controversial speech (the "Albany speech") he had given off campus. Our decision rested on what we understood to be the applicable rule that the government cannot take action against an employee for speaking on public issues, unless it first shows that the speech actually "impaired the efficiency of government operations." *Id.* at 1245. We also vacated the part of the judgment that found six of the defendants liable for punitive damages, as the jury's special verdict responses were "hopelessly irreconcilable" on whether these defendants harbored the necessary evil motives. *Id.* at 1250.

A month after our decision in *Jeffries*, the United States Supreme Court decided *Waters v. Churchill*, 511

U.S. ___, 114 S.Ct. 1878 (1994) (plurality opinion). A four-justice plurality in *Waters* held that the government could fire an employee for disruptive speech based on its reasonable belief of what the employee said, regardless of what was *actually* said. *See Waters*, 114 S.Ct. at 1889. In addition, when weighing the value of the employee's speech against the interference with government operations, the *Waters* plurality also indicated that a government employer need only show that the speech is *likely to be disruptive* before the speaker may be punished. *See id.* at 1887, 1890.

The *Jeffries* defendants, relying on *Waters*, petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, and, without comment, vacated *Jeffries* and remanded to us for reconsideration in light of *Waters*. *See Harleston v. Jeffries*, 115 S.Ct. 502, 503 (1994) (memorandum).

On remand from the Supreme Court, we reverse the district court's judgment because defendants made a substantial showing at trial that their decision to limit Jeffries' term was based upon a reasonable prediction that the Albany speech would disrupt university operations.

BACKGROUND

We summarize the facts briefly; a more detailed account appears in our initial opinion. *See Jeffries*, 21 F.3d 1239, 1241-44.

Leonard Jeffries was the chairman of the Black Studies department at City College of New York ("City College"), which is part of the City University of New York ("CUNY") system. In delivering the Albany speech, which addressed the bias of New York State's public

school curriculum and the history of black oppression, Jeffries made several derogatory statements, particularly about Jews. After the speech, City College President Bernard Harleston and CUNY Chancellor Ann Reynolds arranged for the CUNY Board of Trustees to vote as to whether to limit Jeffries' term as department chair to one year, even though such terms normally last three years. A majority of the 14 members of the CUNY Board of Trustees voted to limit Jeffries' term. The votes were cast as follows: Nine of the Trustees voted to limit Jeffries' term to a year; four voted to remove him immediately; one abstained because she had made critical comments about Jeffries in the past. Harleston and Reynolds did not vote because they were not Trustees.

Jeffries sued Harleston, Reynolds, and all 14 of the individual CUNY trustees under 42 U.S.C. §1983 in the United States District Court for the Southern District of New York (Kenneth Conboy, *Judge*), alleging that they removed him in violation of the First Amendment. (One of the 16 original defendants, Trustee Blanche Bernstein, died during the trial, and Jeffries discontinued his claims against her.) Jeffries sought reinstatement and punitive damages.

The jury was given several sets of interrogatories to answer. In response to the first wave, the jury found that the defendants demoted Jeffries because of the Albany speech. The jury's answers also indicated that the Albany speech did not disrupt "the effective and efficient operation of the Black Studies Department, the College, or the University," but that the defendants "were motivated in their actions by a reasonable expectation" that the speech would cause such a disruption. The judge concluded from these responses that all 15 remaining defendants had violated Jeffries' First Amendment rights

because the speech was substantially on matters of public concern, and did not cause actual harm to CUNY.

The judge then submitted another wave of questions to the jury to discern the individual liability of each of the 15 defendants. In response, the jury found that only six defendants—Harleston, Reynolds, and Trustees Edith Everett, Herman Badillo, Sylvia Bloom, and Harold Jacobs (together, the "Harleston defendants")—took action against Jeffries because of the Albany speech, and would not have done so had Jeffries not given the speech. Of the four Trustees who are Harleston defendants, three had voted to remove Jeffries from his post immediately, and one had abstained because of the negative statements she had made about Jeffries in the past. (The fourth vote to remove Jeffries immediately came from Trustee Bernstein, who died during the trial, and is not part of this appeal.) The jury found that the other nine defendants, all of whom had voted to limit Jeffries' term to one year, did not act with the same retaliatory animus.

On the third and final wave of interrogatories, the jury found that all six of the Harleston defendants had "acted with malicious intent to violate the plaintiff's rights under the First Amendment . . . or with malicious intent to unlawfully injure him, or . . . with a callous or reckless disregard of the plaintiff's First Amendment rights." Based on these findings, the jury awarded punitive damages against the Harleston defendants.

After finding that the defendants were not shielded from liability by qualified immunity, the district judge entered judgment consistent with the jury responses (although he reduced the punitive damage amounts). In addition, the judge ordered the defendants to reinstate Jeffries as chairman of the department for two years. The defendants appealed.

We affirmed the reinstatement order, agreeing with the district court that the defendants had violated Jeffries' right to free speech, and that the Harleston defendants were not shielded by qualified immunity. *See Jeffries*, 21 F.3d at 1245-49. We found, however, that the jury's special verdict responses were inconsistent regarding the six Harleston defendants' liability for punitive damages. Specifically, we could not reconcile the jury's finding that all 15 of the remaining defendants demoted Jeffries based on their reasonable belief that the Albany speech would harm CUNY, with its later finding that the six Harleston defendants demoted Jeffries out of a malicious desire to violate his free speech rights, or at least in reckless disregard of these rights. Thus, we vacated the punitive damage awards against the six Harleston defendants, and remanded for a new trial against these six on the punitive issues. *See id.* at 1249-50.

Upon the defendants' petition, the Supreme Court granted certiorari, vacated our judgment, and remanded with instructions to reconsider our opinion in light of *Waters*. *See Harleston*, 115 S.Ct. at 503.

DISCUSSION

One of the principles driving our earlier *Jeffries* decision was that the First Amendment protects a government employee who speaks out on issues of public interest from censure by his employer unless the speech *actually* disrupted the employer's operations. *See Jeffries*, 21 F.3d at 1245. We expressly held that a mere reasonable belief that the speech would interfere with the employer's operations is not enough to discipline an employee, unless the employee holds a high-level, policy-making position. *See id.* at 1246-47.

Applying that standard, we studied the Albany speech, and found that it squarely involved issues of public concern—namely, the New York state public school curriculum, and black oppression throughout history. *See id.* at 1245-46. Then, after examining CUNY's bylaws, and the testimony of CUNY officials, we agreed with the district court that the position of Black Studies Chairman was a ministerial position at CUNY, and carried no policymaking authority. *See id.* at 1246-47. Thus, we held that the defendants bore the burden at trial to show that the speech actually interfered with CUNY operations. *See id.* at 1246. Given the jury's finding that the defendants had failed to make this showing, we held that the defendants had violated Jeffries' free speech rights. *See id.* at 1248.

At the time, the strict *actual* interference requirement reflected the law of the Second Circuit. *See Piesco v. City of New York*, 933 F.2d 1149, 1160 (2d Cir.) (if the speech "so clearly touch[es] on matters of public concern, the government is required to demonstrate interference with the efficient functioning of the workplace"), *cert. denied*, 112 S.Ct. 331 (1991); *see also Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987) (nature of employee's position determines whether the employee's speech "somehow undermines the mission of the public employer"). The recent *Waters* decision, however, has loosened *Piesco's* shackles upon public employers.

I.

In *Waters*, a four-justice plurality held that the government could fire an employee for disruptive speech based on the government's reasonable belief of what the employee said, regardless of what was actually said. *See Waters*, 114 S.Ct. at 1887, 1889 (O'Connor, J., joined

by Rehnquist, C. J., Souter and Ginsburg, JJ.). Here, however, there is no dispute as to what Jeffries actually said in the Albany speech. Accordingly, we need pursue only that part of *Waters* dealing with the disruptiveness of the speech.

The *Waters* plurality reiterated the test of *Connick v. Myers*, 461 U.S. 138 (1983), to determine when the First Amendment protects speech by a government employee:

> To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing hershelf on this matter must not be outweighed by any injury the speech could cause to the " 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "

114 S.Ct. at 1884 (quoting *Connick*, 461 U.S. at 142 (quoting *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968))).

The plurality then explained that, in applying this test, the extent of the injury caused by the employee's speech need not be actual; rather, the government's burden is just to show that the speech threatened to interfere with government operations. *See id.* at 1887, 1890. It emphasized that greater deference must be given to the government when it acts as employer rather than as sovereign:

> [W]e have given substantial weight to government employers' *reasonable predictions of disruption, even when the speech involved is on a matter of public concern*, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.
>
> . . . .
>
> [A] government employee, like any citizen, may have a strong, legitimate interest in speaking out on

> public matters. In many such situations the government may have to make a ***substantial showing*** that the speech is, in fact, ***likely to be disruptive*** before it may be punished.

Id. at 1887 (emphasis added); *see also United States v. Treasury Employees Union*, 115 S.Ct. 1003, 1018 n.21 (1995) (quoting *Waters* to reaffirm that deference is given to government's reasonable predictions of harm when used to justify the punishment of isolated incidents of employee speech).

We read the *Waters* plurality opinion to hold that the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished. *See Treasury Employees Union*, 115 S.Ct. at 1021 (O'Connor, *J.*, concurring in part, dissenting in part) ("As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification"). There is, thus, a proportion between the nature of the speech and the nature of the sanction that may ensue. Nevertheless, even when the speech is squarely on public issues—and thus earns the greatest constitutional protection—*Waters* indicates that the government's burden is to make a substantial showing of *likely* interference and not an *actual* disruption. 114 S.Ct. at 1887.

II.

Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. *See*

Waters, 114 S.Ct. at 1887, 1889-91. By stressing that *actual* disruption is not required, *Waters* pulls a crucial support column out from under our earlier *Jeffries* opinion. We are not constrained to hold under *Waters* that the defendants did not violate Jeffries' free speech rights if: (1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech.

In the district court the jury's central finding was that all 15 defendants were "motivated" to demote Jeffries by a "reasonable expectation" that the Albany speech would harm CUNY. This jury finding establishes that because the defendants were motivated by a reasonable prediction of disruption, they did not demote him for an improper retaliatory motive. Moreover, we hold that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had. Under *Waters*, then, the jury's finding, if it stood alone, would suffice to show that none of the defendants violated Jeffries' free speech rights.

This finding does not stand alone, however, In response to later waves of interrogatories, the jury found that the six Harleston defendants (but—significantly—not the other nine) demoted Jeffries because of the Albany speech, and that they would not have done so if Jeffries had not given the speech. The jury then decided that the six Harleston defendants "acted with malicious intent to violate the plaintiff's rights . . . or with malicious intent

to unlawfully injure him, or . . . with a callous or reckless disregard of the plaintiff's First Amendment rights."

These later findings are tantamount to a determination that the six Harleston defendants demoted Jeffries in retaliation for his speech, and not to protect CUNY from the ramifications of his speech. *See Rankin*, 483 U.S. at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

As we said in the original *Jeffries* opinion, we cannot harmonize the jury's earlier finding with the later ones. *See Jeffries*, 21 F.3d at 1250. If, as the first finding has it, all the defendants demoted Jeffries because they reasonably believed the speech would harm CUNY, the demotion was not retaliatory. If, as the later findings have it, six of the defendants acted against Jeffries out of malice or reckless disregard for his rights, those six were not motivated by a reasonable belief that the speech would harm CUNY. As to these six defendants, these findings are "hopelessly irreconcilable," *id.*, and would ordinarily require a remand for a new trial. *See Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529-30 (2d Cir. 1992) (remand required where material jury responses cannot be read together rationally).

No retrial is needed here, however, because elementary principles of causation compel the conclusion that Jeffries' First Amendment rights were not violated. *See* 42 U.S.C. §1983 (section 1983 relief only available if the plaintiff was deprived of federal rights). The jury found that at least nine of the defendants, a clear majority, limited Jeffries' term because they expected his

speech would harm CUNY (and not for invidious motives), *and* that this expectation was reasonable.

There is, moreover, no reasonable possibility that the six Harleston defendants tainted the vote with whatever retaliatory motives they may have had. Three of the six Harleston defendants voted *against* the proposal to limit Jeffries' term to one year; two of them were not Trustees, and thus could not vote; and one abstained. While Harleston and Reynolds were instrumental in putting the one-term issue on the Board's agenda, *see id.* at 1247, and may indeed have done so to punish Jeffries, the nine votes based on legitimate grounds constitute a superseding cause breaking the causal chain between the tainted motives (of Harleston and Reynolds) and the decision to limit Jeffries' term. *See Gutierrez-Rodriquez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) (superseding causes relieve defendants of section 1983 liability). And, to whatever extent any of the Harleston defendants inveighed against Jeffries and his speech at the Board meetings, the jury expressly found that these lamentations did not affect the nine Trustee defendants who based their votes on a reasonable expectation of harm. Thus, the motives of the Harleston defendants—whatever they were—did not cause a cognizable injury to Jeffries.

Finally, we note that an amicus curiae argues that we should not apply *Waters* at all because Jeffries, as a faculty member in a public university, deserves greater protection from state interference with his speech than did the nurse in *Waters* who complained about the obstetrics division of the hospital. We recognize that academic freedom is an important First Amendment concern. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the

community of American schools."). Jeffries' academic freedom, however, has not been infringed here. As we held in the earlier *Jeffries*, and as Jeffries himself has argued, the position of department chair at CUNY is ministerial, and provides no greater public contact than an ordinary professorship. *See Jeffries*, 21 F.3d at 1247. Jeffries is still a tenured professor at CUNY, and the defendants have not sought to silence him, or otherwise limit his access to the "marketplace of ideas" in the classroom. *See Keyishian*, 385 U.S. at 603.

CONCLUSION

Because the only defendants who voted in favor of limiting Jeffries' term did so constitutionally, and because the Harleston defendants did not contribute to the decision to limit Jeffries' term, we conclude that Jeffries has not suffered a deprivation of his constitutional rights.

We reverse the judgment of the district court, and remand with instructions to enter judgment for the defendants.

REVERSED and REMANDED with instructions to enter judgment for the defendants.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 94-112

BERNARD HARLESTON, PRESIDENT, CITY COLLEGE OF NEW YORK, ET AL.,
Petitioners

v.

LEONARD JEFFRIES

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Waters v. Churchill*, 511 U.S. ___ (1994).

IT IS FURTHER ORDERED that the petitioners, Bernard Harleston, President, City College of New York, et al. recover from Leonard Jeffries Three Hundred Dollars ($300.00) for their costs herein expended.

November 14, 1994

Clerk's costs: $300.00

APPENDIX C

Law Offices of Joseph Fleming
59 John Street, 8th Floor
New York, New York 10038

Telephone
(212) 385-8036

Facsimile
(212) 406-2045

By Hand

January 13, 1995

George Lange, III
Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Jeffries v. Harleston
93-7876

Dear Mr. Lange:

I represent Dr. Leonard Jeffries, Jr. ("Jeffries"), the Plaintiff-Appellee in the subject appeal.

The parties have been directed to submit a letter brief, limited to the applicability of **Waters v. Churchill**, 114 S.Ct. 1878 (1994), to the issues presented by the appeal of the Defendants-Appellants (hereinafter referred to as "CUNY"). The following is submitted in accordance with the Court's directive.

The Supreme Court has asked this Court to reconsider this matter in light of the **Waters** decision. A proper reconsideration must be supported by the facts that con-

stitute the true parameters of the events and circumstances that have shaped this case. This will not be possible if the Court allows itself to be unduly influenced by CUNY's creative and subtle misinterpretation of those events and circumstances. In its Petition for a Writ, CUNY has described one of the questions presented as:

> 1. Whether the First Amendment requires administrators to retain, **in a position of leadership,** a person who has engaged in a speech containing hateful, poisonous and reprehensible comments, reasonably believed by the administrators to be potentially harmful to the university, as well as thuggish conduct.

For the reasons discussed below, this statement of the question presented on appeal twists the facts as found by the jury, confirmed by the trial court after trial, and, thereafter, affirmed by this Court of Appeals. We are compelled, therefore, to first address CUNY's efforts to reshape the facts.

CUNY saw **Waters** as its last best hope, and now utilizes **Waters** as the bedrock of its argument. The true and relevant facts in **Waters**, that **Waters** is clearly distinguishable. It was thus necessary for CUNY to create a new set of facts, only loosely related to reality, and present them as if they were proven at trial. Specifically, in CUNY's effort to conform to the parameters of **Waters** it used the term "leadership position" to describe Jeffries' role as Chairman of the Black Studies Department (the "Department"). This intended to define Jeffries' role as one that encompasses a University wide or College wide responsibility. This is misleading and inaccurate. CUNY has constructed an argument that depends on the Court's acceptance of the premise that Jeffries, as Chair, occupies a position of responsibility and authority, outside of the

Department, to the extent that he is a representative and a spokesperson for the University. The simple fact is that neither Jeffries nor any of the other Chairpersons within the CUNY system are managerial employees, they are not spokespersons for CUNY or the City College of New York ("CCNY"), and they exercise no authority whatsoever on a college wide or university wide basis. **The language of the CUNY By-Laws clearly and simply describes a Chairpersons role as that of leader, spokesperson and advocate for the University or the College.** (By-Laws, Article IX, Section 9.3.) Accordingly, Jeffries' duty and function is to represent the interests of the Department. In a CUNY system containing 21 colleges, with more than 208,000 students (from every existing ethnic background culture and political thought), 596 managerial administrators and 9,100 faculty members, Jeffries is one of approximately 595 Chairpersons,[1] the vast majority of whom toil in relative but honorable obscurity because their positions are ministerial and do not require public interaction beyond the internal CUNY community.

Unlike most of his colleagues, Jeffries has public recognition, not because of his position as Chair of the Department, but rather because of his independent work in the field of public education and Black and Africana Studies. This work was done outside of and apart from his ministerial duties as Chair of the Department. His public personae, therefore, is not a result of or related to his association with CUNY or even the Department. As a private citizen Jeffries has been a prominent figure and voice in the very heated national debate over curriculum reform. That debate has pitted different groups against

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[1] Source: Peterson's College Guide,

each other, including Blacks and Jews. As unpleasant and as undesirable as the topic of conflict between Blacks and Jews may be, it is a fixture in our national landscape of debate. According to the First Amendment, Jeffries has every right as a citizen of this country to address the issue of curriculum as it relates to the various conflicts surrounding curriculum reform and to express his views on the roles various people have played in the history of the world and how that relates to teaching and instruction. CUNY is asking this Court to use Waters to remove that right from Jeffries.

As this Court reconsiders CUNY's appeal in light of Waters, it must be conscious of the essential facts, not as designed and presented by CUNY to suit its needs, but as presented and accepted at the trial of this matter, and as can be reasonably inferred therefrom. The essential facts are:

1. That the speech in question (the "Speech") was delivered by Jeffries outside of the scope of his employment, and contained no criticism of CUNY or CUNY's policies or practices related to its public function;

2. That Jeffries made the Speech in his capacity as a scholar and a private citizen;

3. That the Speech was made during Jeffries' summer vacation, in no way associated with any function or activity of the Department, CCNY or the University;

4. That the location of the Speech was more than one hundred fifty miles from his place of employment;

5. That the Speech was made before a group of American citizens who were intensely interested in everything Jeffries had to say and who gave him an ovation upon the completion of the Speech.

6. That notwithstanding the concern of some other Americans who found the Speech offensive, the American citizens to whom Jeffries spoke, and many other Americans who heard or read the Speech thereafter, were not offended.

The latter fact demonstrates the reason the First Amendment is such an important part of our constitutional rights. Here, we are confronted with competing idealogies, interests and sensibilities. We are also confronted with different interpretations of the validity and even the intent of the words spoken by Jeffries. What is important here is that Jeffries spoke as a private citizen/scholar, on issues that are at the center of an academic maelstrom, espousing and interpreting years of research and experience. As a Professor of Black and Africana History and a proponent of theories, visions and conclusions not popular with the political and academic mainstream, Jeffries is the very person the Constitution and the laws of this nation are intended to protect.

With the foregoing in mind, an examination of **Waters** must lead this Court to the conclusion that **Waters** is not applicable to this case and should not lead this Court to any conclusion except to re-affirm its prior decision. While **Waters** has opened the exit door a little wider for public employees, it is still consistent with its predecessors including **Connick v. Meyers**, 461 U.S. 138 (1983); **Hall v. Ford**, 856 F.2nd 255 (D.C. Circuit 1988); **McMullen v. Carson**, 754 F.2nd 936 (11th Circuit 1985); **Dartland v. Metropolitan Dade County**, 866 F.2nd 1321 (11th Cir. 1989); and, **Mings v. Department of Justice**, 813 F.2nd 384 (Fed. Cir. 1987), to name but a few. In each of these cases, as in **Waters**, the speech in question was either a direct criticism of the employer or a practice or policy of the employer. In each of these cases, the

Court found that the speech had an impact on the effective and efficient operation of the employer or the confidence or morale of other employees to the extent that it affected their ability or willingness to work, or, as in McMullen, which involves a law enforcement employee who announced his active membership in the Ku Klux Klan, that the speech in question created a situation directly and negatively impacting the ability of the employer to effectively perform the public service it was responsible for providing.

What Waters did, through a deeply divided court, was to expand the concept of reasonable expectation, and provide a means by which the Government, as employer, could protect the workplace from disruption when the speech of an employee contains utterances that threaten, or can reasonably be expected to threaten, the ability of the Government, as employer, to properly function.

In the wake of the Speech, only the constant effort on the part of CUNY to appease a hungry press and opportunistic politicians, troubled the other wise firm current that always flows through an academic environment. The Speech itself, while it certainly generated heated, sometimes rowdy, sometimes caustic debate across college campuses and talk show stages around the country, did not disrupt or threaten to disrupt CUNY's ability to perform its public function. (Notwithstanding CUNY's effort to impose its political and social idealogy as its public function, its true function is to provide an education which includes an examination of all views and ideas, and requires frequent shopping trips to what should be a very hectic market place of ideas. This function was not hampered by the Speech.) Nor did the Speech harm CUNY in any way. No evidence was presented at the trial, which took place almost two years

after the Speech, of any refusal or failure of any student, faculty member or administrator to work with Jeffries or to work with or within CUNY, as a result of the Speech. Nor was there any evidence of any reduction in enrollment. In fact, enrollment has steadily increased in the Department, in the College and throughout the University since the Speech. University-wide, student enrollment has gone from 199,554 during the 1991-92 academic year (the year the Speech became a public issue) to 202,531 during the 1992-1993 academic year. Student enrollment for the 1993-94 academic year, the year following Jeffries' highly publicized and successful litigation against CUNY, and his subsequent reinstatement as Chair of his Department, jumped to 208,000.[2]

When we examine **Waters**, we find no relation to the facts underlying the case before this Court for reconsideration. In **Waters**, a nurse is alleged to have spoken ill of her employer, a public hospital, and its programs. As a consequence of her speech, the nurse was terminated from her employment. The Supreme Court upheld her firing in the face of her argument that she was being punished by the government because of her speech, concluding that the employee was properly discharged because the discharge was based on that part of her speech that was disruptive and not on a matter of public concern. (By contrast, the parts of the Speech causing the most uproar related to Jeffries' statements about the roles of Jews in the slave trade and Hollywood. These subjects were found, as a matter of law, to be clearly matters of public concern by the trial court.

Based on the Court's rationale in deciding **Waters** as it did, we must ask how far **Waters** should reach? Should

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[2] Source: City University of New York, as reported by the New York Times, January 9, 1994.

it relate to speech that does not involve or affect the function of the employer or the duties of the employee? Should it be permitted to allow a dormant institution to reach one hundred and fifty miles into the private life of an employee whose speech happened to be recorded and then given public life by a press with an agenda? We should not be prepared to apply **Waters** to this case, to do so would dampen the spirit and the intent of the First Amendment, and threaten the right of every public employee who has an opinion that may be unpopular, to express that opinion free from fear of reprisal. To apply **Waters** to this case would permit the Government as employer to censor millions of American citizens whose speech is viewed as unpopular but which speech has not been proven to be disruptive to the work place and which cannot reasonably be expected to be disruptive. **Waters** involved speech that directly affected the function of the employer, and related to the duties of the employee. It should not be expanded to cover speech, such as the Speech, that is unrelated to the function of the employer, and in no way connected to the duties of the employee.

The factual distinctions are many, and they are stark. The leap this Court is being asked to make between **Waters** and Jeffries is dangerous and will have a chilling effect on public employees everywhere. With the few exceptions enunciated in the cases previously cited herein, individuals, even those employed by the government, have a right to speak their minds on matters of public concern. This is especially so when the issue is, as it really is in this case, a matter of political and cultural disagreement. In reality, there is no disruption as a consequence of the Speech, there is no threat of disruption. There is no argument, as there was in **Waters**, about what Jeffries said or whether he said it. There is really

no question as to whether there existed, at the time CUNY acted against Jeffries, violating his First Amendment rights, any reasonable expectation of harm. In Waters, as in Connick, the Court determined that a reasonable expectation is a sufficient basis for termination of an employee, even where no actual disruption has been or can be shown. Waters requires, however, that the government act in good faith and that when judging the employer's acts the Court "should look to the facts as the employer reasonably found them to be," Waters, 114 S.Ct. at 1889.

In Jeffries, the facts as CUNY reasonably found them to be at the time it took action to strip Jeffries of his Chairmanship, were, that he had, for eight months following the Speech, performed his duties as chair unaffected by the Speech, and that the Department, the College and the University had not been harmed in any way as a result of the Speech. It was also a fact that whatever expectation CUNY had of harm or disruption, reasonable or otherwise, had long since given way to reality. That reality was that there was no harm and no threat of harm. Most importantly, it must be noted, that notwithstanding the non-existence of that harm or the threat of harm, CUNY pushed forward with its plan to oust Jeffries. CUNY acted in bad faith, ignoring the facts as it reasonably found them to be and punished Jeffries for his speech simply because those in power disagreed with him. These individuals, exercising their power as public officials, were engaged in an ideological and political response to Jeffries speech. They used their power and authority as government officials to impose their ideological and political preferences upon Jeffries and to serve chilling notice upon others that if they expressed their views they too could be punished.

We should not be fooled by CUNY's pious reliance upon its defined "mission." It should be noted that a recent appearance by Professor Michael Levin, a City College professor and employee of CUNY, on a nationally syndicated talk show during which he freely espoused his racist views about the criminality and inferiority of Blacks, was not met by even a whimper from the University, the College, the press, or the politicians. This is so because the Americans most offended by Levin's statements are without the power and the access to the media to express their outrage. The relative ability to register your disagreement with the speech of another should not be the measure of the Court's intervention in the free exercise of one's Constitutional rights. In Levin's case, his recent speech was not attacked by CUNY even though it was contrary to CUNY's "mission" as presented to this Court in defense of CUNY's actions against Jeffries. As this Court is aware, CUNY has a history with Levin based on its unsuccessful attempt to take action against him because of statements he made some years ago. It is interesting to note that CUNY did not appeal this Court's decision to affirm Levin's rights as determined by the District Court. It is of further interest to note that CUNY has taken no steps to counter Levin's continued statements against Blacks following the proceedings in this Court. Levin v. Harleston, 770 F.Supp. 895 (S.D.N.Y. 1991) aff'd in part and vacated in part, 966 F.2d 85 (2d Cir. 1992). It would appear, therefore, that Levin's speech is protected and unabridged because he does not offend to the extent Dr. Jeffries does, those who happen to be in power at this point in time. This Court should not ebb and flow with shifts and changes in power, philosophy, and ideology, but should stand steadfast in protecting the First Amendment freedoms of all of our citizens.

Waters does not stand for the philosophy CUNY would have this Court impose upon this case. Waters did not contemplate intruding in the realm of academic freedom. Yes, there is a clear and distinct element of academic freedom running through the heart of this matter. More than simply an employer, CUNY is an academic institution of higher learning. The debate in which Jeffries was engaged as he gave the Speech, was one that is at the center of academic circles throughout America. He spoke as one sharing and reacting to historical information and its impact on the poltical, economic and social well being of a large segment of the population of the United States. It is well established, that academic freedom is a special concern of the First Amendment. Keyishian v. Board of Regents of University of New York, 385 U.S. 589, 87 S.Ct. 675 (1967). By applying Waters to Jeffries, the Court would be ignoring Keyishian and its progeny.

We cannot, if we truly wish to preserve the freedoms available in our society emasculate the very document that protects those freedoms. Sometimes, the only thing that stands between all of us and anarchy are the ideals embodied in our Constitution and its Amendments. Waters may have opened the door a little wider to allow the government to act against employees for their speech. We do not believe, however, that it was the intention of the Justices of the Supreme Court who participated in one part or another of the Waters decision, to open the door so wide that every case should go rushing in.

Certainly there is no room in Waters for this case, and accordingly, on reconsideration, the judgment of the District Court should remain affirmed.

Respectfully Submitted,

/s/Joseph Fleming, Esq.
Joseph Fleming, Esq.
Attorney for Dr. Leonard Jeffries, Jr.
Plaintiff-Appellee
JF-9542

cc: Attorney General of the
State of New York
Attorney for Defendants-Appellants

APPENDIX D

State of New York
Department of Law
120 Broadway
New York, N.Y. 10271
(212) 416-8601

Dennis C. Vacco
Attorney General

Kathie Ann Whipple
Acting Bureau Chief
Litigation Bureau

January 13, 1995

Hon. Ellsworth A. Van Graafeiland, Circuit Judge
Hon. Joseph M. McLaughlin, Circuit Judge
Hon. Ellen B. Burns, District Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: *Jeffries v. Harleston*
Dkt. No. 93-7876

Honorable Judges:

This letter responds to the Court's Order, dated December 23, 1994, directing the parties to address the applicability of the Supreme Court's decision in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994), to the instant appeal. For the reasons set forth below, *Waters* requires an outright reversal of the district court's decision. Even if the Court concludes that a new trial is

necessary, however, *Waters* requires, at a minimum, a reversal of the district court's decision denying defendants qualified immunity from liability in damages and a remand with appropriate instructions concerning the applicable legal principles.

Waters Requires A Reversal Here

In *Waters*, the Supreme Court consciously and deliberately rearticulated the principles which control when action taken by a public employer with respect to one of its employees is alleged to implicate First Amendment considerations. The Court started from the premise that "the government as employer . . . has far broader powers than does the government as sovereign." 114 S.Ct. at 1886. Although the Court acknowledge, quoting *Cohen v. California*, 403 U.S. 15, 24-25 (1971), a decision overturning a conviction for wearing a jacket bearing a scatological slogan in a courthouse, that "[t]he First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate,' " the Court also observed, as one of several examples, that it had "never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to people with whom they work." 114 S.Ct. at 1886. Similarly, the Court observed that "a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large." *Id.* at 1886-87.

In addressing the nature of the showing the public employer is required to make, in order to avoid liability, the Court observed that it has:

> consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative.

Id. at 1887. The Court further noted that it has given "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential." *Id.* Indeed, the Court instructed that, even when speech touches *substantially* on matters of public concern, the employer need only make "a substantial showing that the speech is, in fact, *likely* to be disruptive before it may be punished." *Id.* (emphasis supplied).[1]

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[1] A plurality of the Court concluded that if the supervisors reasonably believe that the employee's speech, as reported to them, would be disruptive, then they were entitled to prevail in the *Pickering* balancing process *(see Pickering v. Board of Education*, 391 U.S. 563 [1968]), even if the employer was mistaken as to the true facts. *Waters*, 114 S.Ct. at 1890. Although the four justices who joined in the plurality opinion constituted less than a majority, the plurality opinion will govern future cases, because three concurring justices concluded that the defendants' *actual* beliefs should be dispositive, regardless of the "reasonableness" of such beliefs. *Id.* at 1895. Thus, as Justice Souter explained, in a separate concurring opinion, "A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext). . . ." *Id.* at 1893.

The Court remanded in *Waters*, despite the majority's conclusion that the defendants could legally have terminated the plaintiff,

[footnote continued]

It is clear, given *Waters*, that the legal conclusions underlying the result here, that "First Amendment protection . . . extends to all speech on public matters, no matter how vulgar or misguided," *Jeffries v. Harleston*, 21 F.3d 1238, 1245-46 (2d Cir. 1994), and that the defendants bore a burden of persuading the jury not merely that they were reasonably concerned about the impact of the speech but that the speech in question actually "caused substantial disruption," *id.* at 1246, are now untenable. Even assuming, *arguendo*, that this Court, and the court below, were correct in concluding that Jeffries' speech touched substantially on matters of public concern (*see infra*), defendants were required only to make a substantial showing that harm as a result of that speech was *likely*, not a showing of actual harm, or "substantial disruption," as this Circuit held.

The *Waters* standard was clearly met here. The jury found that defendants reasonably believed that Jeffries' speech would be disruptive to the University. (A 130) The fact that the jury did not also find that the predicted harm actually occurred is irrelevant. The court below should have "look[ed] to the facts as [defendants] *reasonably* found them to be," at the time of their actions, *Waters*, 114 S.Ct. at 1889, not as the jury ultimately found them to be, more than a year later, and should

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based on her remarks as reported to them, for a determination as to whether the plaintiff was "actually fired because of [her] statements, or because of something else," *id.* at 1891, a finding the district court had never made. Here, in contrast, the jury has found both that the defendants were actually motivated by concerns about the impact of the speech and that these concerns were reasonable. (A 130) Plaintiff never cross-appealed or otherwise questioned this finding, and is therefore bound by it, insofar as it is relevant to liability. Accordingly, this Court should not remand for new fact-finding in the district court.

have given substantial weight to defendants' reasonable predictions of disruption. Otherwise, "[t]he government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw," *Waters*, 114 S.Ct. at 1888, which could often turn out (and here turned out) to be two different things.

At trial, defendants introduced uncontroverted evidence of the adverse reactions to Jeffries' speech. For example, defendants established that various of the colleagues with whom he could be expected to interact at The City College were offended by the speech (EA 19, 22, 46), that various of his supervisors lost confidence in his ability to act as Chair and serve as a spokesperson for University interests (A 442-43, 485-86, 510-11, 541-43, 618-27, 633-35, 743-44; EA 132, 142, 181-82), and that defendants received negative communications from alumni and others as a result of the speech (A 442-43, 499, 633-34, 743-44). The district court itself found that Jeffries' ethnic slurs "provoked a media uproar" (A 180), were "egregiously offensive and destructive" (A 219), and evoked "widespread dismay and alarm" (*id.*). Thus, any reasonable jury would have been required to conclude that defendants had made a substantial showing that harm to the University was likely here.

Moreover, the district court found that Jeffries engaged in several episodes of "thuggish" conduct during the review period (A 214-15). This conduct, combined with the adverse reactions to the speech observed by defendants, further indicated that reappointing Jeffries as Chair would be likely to produce disruption. Given all of these considerations, and the clarification provided by

Waters, it is evident that it was error to conclude that Jeffries' interest outweighed the defendants' in the instant case. That holding should now be reversed and Jeffries' claims for declaratory relief, punitive damages, and reinstatement dismissed.

At A Minimum, Waters Requires A New Trial

At the commencement of trial in the instant case, defendants argued that some portions of plaintiff's July 20, 1991 speech, *i.e.*, Jeffries' personal attacks on colleagues, including other City University professors, and his derisive references to Jews, Italians, and Caucasians in general, were not matters of public concern and that a finding of reliance solely upon such remarks could not trigger constitutional liability. The district court, however, ruled that because Jeffries' speech was predominantly on matters of public concern, it was irrelevant whether defendants' actions were caused solely by particular parts of his remarks, even if those parts, standing alone, would not have constituted protected speech. (A 85-86)

Waters flatly repudiates that view. In *Waters*, the Supreme Court explicitly observed that:

> So long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. The *Connick* test [*see Connick v. Myers*, 461 U.S. 138 (1983)] is to be applied to the speech for which Churchill was fired. [Citations.] *An employee who makes an unprotected statement is not im-*

> ***munized from discipline by the fact that this statement is surrounded by protected statements.***

114 S.Ct. at 1891 (emphasis supplied).

As noted above, *Waters* establishes that a government employer may discipline or terminate an employee for speech that would otherwise have the fullest protection under the First Amendment, and may do so using standards, such as rudeness or offensiveness, that would be inappropriate in other contexts. The remarks at issue here contain precisely the sort of rude and offensive utterances to which the Supreme Court referred. A finding by the jury below that the defendants who relied on the speech had been motivated solely by Jeffries' personal attacks or ethnic slurs would have been dispositive in defendants' favor, even without *Pickering* balancing. Thus, defendants are, at the least, entitled to a fair opportunity to establish that it was Jeffries' invective, and not his substantive comments about the multicultural curriculum, which caused the review resulting in the rejection of his reappointment to a three-year term as Chair of the Black Studies Department.

Waters Requires A Grant Of Qualified Immunity

If this Court concludes that a new trial is necessary, it must nevertheless reverse the decision below on the issue of defendants' entitlement to qualified immunity, in light of *Waters*. In denying qualified immunity on the original appeal, this Court held that it was clearly established that, absent a showing of actual disruption, "a public employer may not sanction an employee for speaking on issues of social or political concern." *Jeffries v. Harleston*, 21 F.3d at 1248. *Waters* establishes that the articulation of the law was erroneous. Now that it is clear

that a finding of actual harm is not required, and given the particularized balancing which the Court has said, in *Connick* and *Waters*, is required, qualified immunity is completely appropriate here. Defendants should not be held liable in damages, on the ground that the applicable principle was clearly established in this Circuit, at the time of defendants' actions, where the Circuit's formulation of that principle has itself been rejected. Moreover, defendants cannot fairly be expected to have applied *Pickering* principles to the facts of this case, and known the correct outcome, where the Circuit Courts of Appeals have themselves encountered difficulties interpreting and applying *Pickering* principles.

Accordingly, given *Waters*, defendants respectfully request that the Court reverse the decision below in its entirety. In the alternative, the Court should grant defendants qualified immunity and remand for a new trial, solely on declaratory and injunctive relief, and with appropriate instructions concerning the application of the principles articulated in *Waters*.

Respectfully submitted,

/s/Kathie Ann Whipple
Kathie Ann Whipple

cc: Joseph Fleming, Esq.
Kenneth S. Stern, Esq.
Sheldon D. Camhy, Esq.

APPENDIX E

Law Offices of Joseph Fleming
59 John Street, 8th Floor
New York, New York 10038

Telephone
(212) 385-8036

Facsimile
(212) 406-2045

BY HAND

January 17, 1995

George Lange, III
Clerk
United States Court of Appeals
for the Second Circuit
Foley Square, Room 1702
New York, New York 10007

Re: Jeffries v. Harleston
93-7876

Dear Mr. Lange:

This letter is respectfully submitted in reply to the Letter Brief submitted by the Defendants ("CUNY") regarding the applicability of **Waters** to the instant appeal.

CUNY argues first, that **Waters** requires a reversal because CUNY acted based on a reasonable fear of disruption. CUNY cites, in initial support of its argument, the Court's reference to **Cohen v. California**, 403 U.S. 15 (1971). Although the Court in **Cohen** protected the right of an individual to engage in speech through the wearing of a jacket bearing a scatological slogan in a courthouse, CUNY finds comfort in the Court's expression of the

observation that notwithstanding the Court's finding in Cohen "a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to people with whom they work." The philosophy of the Court creating parameters for exceptions to the protection afforded to Cohen, should not be applied to cases where a government employee's statements are not directed at the public in the course of the employee's employment. If we were to allow this, the application would be dangerous, giving government the ability to act against anyone whose utterance comes to light and offends someone's sensibilities. Are we to remove Newt Gingrich, as House Speaker, because, through the magic and intrusiveness of television, we know that he is guilty of offensive utterances with respect to the First Lady, and by reason of the nature of the utterance, with respect to all women?

CUNY goes on to argue that its reasonable predictions of disruption are its saving grace, and implies that it made a substantial showing (a conclusion not supported by the trial record), that it reasonably believed that the Speech would be disruptive, and that it acted on that reasonable belief. The key word here is "reasonable." According to Waters, reasonableness is measured as of the time of the employer's actions, based on what the employer knew, in good faith, the facts to be at the time it acted. In response to the Speech, if CUNY had taken immediate steps to remove Jeffries from his position as Chair, during the height of the onslaught from the media and politicians, and prior to the commencement of the fall semester, it would be able to intelligently argue that it acted based on an expectation of disruption. Under that set of facts we would be confronted with a final outcome resting only on a Pickering balancing test. This was not the case, however, and we are left instead with a curious

effort to place fiction over reality and allow CUNY's imagination to prevail over the facts as it knew them to be at the time it acted against Jeffries. If this is so, we must ask ourselves to define what the Court really means when it speaks of expectations and predictions.

CUNY would have us define expectations and predictions in perpetual terms, unconcerned with intervening reality. CUNY, would have this Court ignore the fact that CUNY conducted an investigation of the impact and the effect of the Speech on Jeffries' ability to perform his duties, and on the impact of the Speech on the operation of the Department, the College, and the University. Over an eight (8) month period of time, CUNY found that the Speech had not adversely affected any aspect of Jeffries' ability to do his job, nor had it, in any adverse way, affected the function of the Department, the College or the University. Yet, CUNY stripped Jeffries of his chairmanship, and it did so simply because its officers and trustees, officials of the State of New York, disagreed with the content of the Speech. This is the real issue here, it's personal. There is no noble effort on the part of CUNY officials to protect the University from the effects of disruptive utterances, but rather, there is an effort to censor speech with which these government officials do not agree. The issue of disruption and reasonable expectation of disruption are simply a pretext for the real motivation, to punish Jeffries because of the content of his Speech.

CUNY's argument is replete with references to its expectations, and refers to personal reactions to the Speech, rather than its impact. These personal reactions, CUNY argues, would lead any reasonable jury to conclude that CUNY made a substantial showing that harm to the University was likely. Certainly, the Speech was the

subject of a media uproar or more appropriately, a media frenzy, and, it had all of the ingredients of an open debate (heaven forbid that this would exist on a college campus), including, verbal tumult, discord, and utterances **from both sides of the issue**, that were from time to time considered offensive to one or the other. CUNY believes that **Waters** is intended to restrict and limit the debate, to have at least one side of the debate quieted, if not silenced altogether. CUNY believes that **Waters** is intended to snatch the voice of dissent from the throat of the dissenter no matter where he speaks, be it within or outside of the scope of his employment, especially if that voice speaks with anger or passion, and certainly if that voice dares to criticize those who have the power, the resources and the vehicles to mount and sustain an effort to punish the offending speaker.

All of CUNY's arguments about disruption and likelihood of disruption are without merit. What is important, in the context of any comparison of the fundamentals of **Waters** with Jeffries, is to determine to what extent the Speech was related to or did in fact affect, any aspect of Jeffries' duties as an employee of CUNY. The political differences at the center of the debate between Jeffries and those who were angered by his Speech existed between Jeffries and CUNY officials and some of the CUNY staff, **before** the Speech. There was no change in the way these people dealt with and felt about Jeffries and his ideas after the Speech, and no real disruptive change in the way in which Jeffries performed his tasks or affected the Department, the College or the University.

CUNY is without the honest ability to argue that it was, at the time it acted against Jeffries, reasonably concerned that Jeffries' continued presence as chair or the fallout

from his Speech, might cause disruption in the Department, at the College or at the University. It must be remembered that the Faculty of the Department clearly expressed its support for Jeffries following the Speech. Moreover, the Faculty Senate at the College took the stance that Jeffries should not be punished for his Speech. They voted this way because they realized that in their world, ideas and controversy go hand in hand, and that the result of mixing the two should be debate, protected by the First Amendment and the concept of Academic Freedom. They knew that if Jeffries can be punished today they could be punished tomorrow. Similarly, the American Association of University Professors has expressed concern over the direction CUNY would have this Court go in applying **Waters** in disposing of the instant appeal. While within these groups, the Faculty Senate and the Association of University Professors, there is disagreement, even anger over some aspects of Jeffries' speech, there is no desire on their part, to see the Constitution trashed in an effort to punish him.

As to CUNY's argument that the jury found that CUNY "reasonably believed that Jeffries' Speech would be disruptive to the University," there is an over reliance upon this aspect of the jury's findings as CUNY ignores the rest of the jury's conclusions. What is relevant is that the jury found that CUNY acted with malice and reckless disregard for Jeffries' First Amendment rights. These facts struck this Court as inconsistent and led to the decision to remand for a new trial on the issue of damages. We would argue that it was not really inconsistent, as the jury determined that CUNY's initial response to the Speech—the public condemnation, the investigation and the temporary limitation on Jeffries' term while the investigation continued, was a reasonable response to a

fear of disruption. When all of the facts were at the Jury's disposal, it was able to conclude that at the time CUNY removed Jeffries as chair, the facts as CUNY reasonably found them to be, eliminated any concern of disruption and could not justify the action CUNY took.

With respect to the balance of CUNY's arguments, we would argue that **Pickering** is still good law and that when applied to this case it requires a finding in favor of Jeffries. The interest of the government as employer and operator of an academic institution, whether measured through the weight of disruption, or the weight of expectation, does not outweigh the interest of the individual academician in being able to freely express his ideas, especially when those ideas are expressed as a private citizen, outside of the scope of the individuals employment.

CUNY is content with establishing that it had a reasonable fear of disruption based on its argument now advanced, but not championed at trial, that certain of Jeffries' utterances were personal attacks or ethnic slurs. There are many who did not find those remarks offensive. (Certainly none of them were as mean spirited as Newt Gingrich's remark about Mrs. Clinton.) All of the comments were made in the context of a free wheeling discussion about issues of importance to a large segment of our society, including a discussion about those in our society who represent vocal and organized opposition to that interest.

The debate in which Jeffries was engaged had always been a caustic one, with barbs flying from both sides. The tone and tenor of the debate, one in which Jeffries was engaged as a private citizen and scholar, had been set by the opposition when they began a relentless attack on Jeffries following his involvement with the New York

State Task Force on Excellence and Equity in Education, through which he strongly criticized the bias in the public school curriculum, thus, making him an instant enemy of all who had a vested interest in maintaining the status quo of that curriculum. Jeffries had no problem being anyone's enemy, or engaging in raucous debate. He does have a problem, as well all should, when the government enters that debate and seeks to silence one of the participants.

All that CUNY can truthfully argue is that its officials were offended by the Speech and that rather than allow free enterprise in the market place of ideas, they wanted Jeffries punished as a consequence of the Speech. The so-called "adverse reactions" to the Speech are not in themselves sufficient reason for Jeffries' removal, even under the liberal application of the rules enunciated in **Waters**. They are merely the natural and probable consequence of strong reaction to the expression of strong opinions, i.e., lively, adamant and sometimes raucous and caustic debate. CUNY is arguing that **Waters** be applied here because there are groups within our society that disagreed with Jeffries, and that there were individuals within the University who disagreed with him. The measuring stick that **Waters** requires this Court to use, is not defined by whether or not some disagreed with Jeffries. If simple disagreement, no matter how vehement, were sufficient to punish an employee who speaks his or her mind while engaged in speech as a private citizen, at a function wholly unrelated to his employment and his duties and responsibilities to his employer, then, eventually, no one employed by the government will be safe, no one will find protection in the First Amendment. If adverse reaction is the measure and if this case ultimately stands for the ability of the government as

employer to punish an employee when his speech has had no effect, and will have no effect, on the government's function as employer, then every public employee who harbors and then expresses an idea that evokes a strong reaction, would be subject to punishment, and our First Amendment would be a shambles.

Under the argument advanced by CUNY, Martin Luther King, Jr., as a government employee would be subject to punishment because his ideas were initially unpopular and provoked adverse reactions. So, too, would other great Americans whose courage and conviction caused them to speak out before their ideas were recognized for their true value and relationship to the American dream. On the other side, if they were all public employees, the likes of Strom Thurman, John Stennis, George Wallace, Bob Grant, Rush Limbaugh, Newt Gingrich, and, of course, CCNY Professor Michael Levin, all of whom have offended, or do offend significant portions of the American people, would, under the precedent CUNY is asking be set in this case, be subject to punishment if those in power at the time of any of their utterances, were offended by or disagreed with their speech.

We must understand that while the point now is to get Dr. Leonard Jeffries, Jr., at all costs, the price our society will pay will be heavy. The blind rush to apply Waters to Jeffries, is an emotional, political, and in some quarters, a purely race-based response to something that our Constitution tells us should be met with debate. (Jeffries is an African American). We see the response in some quarters as race based because African Americans have long been subjected to racial slurs and derogatory statements from public officials and government employees in utterances that have no connection whatsoever to

legitimate matters of public concern. Never, never have we seen the type of intense, prolonged, concerted and mean spirited response in any of those instances as we see here. We have not seen this response at any time in the past and we don't see it today (i.e., as in the case of Michael Levin, a Jewish professor at City College, who appears on nationally syndicated talk shows, expousing a philosophy of Black criminality and inferiority).

Years from now Jeffries will be the precedent to which government as employer and individuals as government employees will look for guidance. Will Jeffries stand for the proposition that government, as employer, through individuals acting under the color of their authority as government officials can follow their employees into their private lives and punish them if their speech falls outside of certain boundaries of the employer's sensibilities? Will it stand for the proposition that academic freedom no longer enjoys a special relationship to the First Amendment? Or, will it stand for the proposition that the First Amendment is not subject to the whims of the politics and the emotions of the day. Only the latter proposition will preserve and protect the First Amendment. Any other response will begin an erosion that will ultimately destroy it.

Respectfully submitted,

/s/ Joseph Fleming
Joseph Fleming
Attorney for Plaintiff-Appellee
Dr. Leonard Jeffries, Jr.
JF-9542

JF:tjh

cc: Attorney General of the
State of New York

APPENDIX F

State of New York
Department of Law
120 Broadway
New York, N.Y. 10271
(212) 416-8601

Dennis C. Vacco
Attorney General

Kathie Ann Whipple
Acting Bureau Chief
Litigation Bureau

January 17, 1995

Hon. Ellsworth A. Van Graafeiland, Circuit Judge
Hon. Joseph M. McLaughlin, Circuit Judge
Hon. Ellen B. Burns, District Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

Re: *Jeffries v. Harleston*
Dkt. No. 93-7876

Honorable Judges:

In his January 13, 1995 letter-brief ("Pltf. Let. Br."), plaintiff has largely ignored this Court's request that the parties address the applicability of *Waters* to the instant appeal, choosing instead to rehash arguments presented on the original appeal and in his memorandum in opposi-

tion to defendants' petition for a writ of certiorari.[1] When plaintiff finally addresses *Waters*, he asserts that the facts there are different and that the holding of *Waters* is thus distinguishable (Pltf. Let. Br. at 5), thereby implying that the balance of the Supreme Court's opinion is mere surplusage.

The short answer to plaintiff's argument is that the Supreme Court could easily have discerned distinguishability itself. Had the Court believed that the distinctions between the cases precluded the fruitful application of the ideas expressed in *Waters* to the instant case, it would presumably have simply denied the petition. By granting the petition, vacating this Court's decision, and remanding the matter to this Court, with explicit instructions to *consider Waters*, the Supreme Court signaled its desire to have this Court reflect upon the principles articulated therein and apply them in the instant appeal. Plaintiff's assertion that "[t]he leap this Court is being asked to make between *Waters* and Jeffries is dangerous and will have a chilling effect on public employees everywhere," Pltf. Let. Br. at 6, is similarly unavailing, where the Supreme Court has directed this Court to reconsider its decision in light of new authority.

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[1] Plaintiff appears to suggest that the remand from the Supreme Court was merely the result of some trickery on defendants' part, and not the product of reasoned analysis (Pltf. Let. Br. at 1-4). The primary obstacle to this argument, apart from its untruthfulness, is that plaintiff responded at length to defendants' petition. Thus, this Court may safely assume that the Supreme Court operated on the basis of full knowledge of the relevant facts and law. In any event, the examples plaintiff cites do not support his thesis. As plaintiff in *Waters* did not hold a "leadership position," for example, it is clear that defendants did not "use[ ] the term 'leadership position' to describe Jeffries' role" in an "effort to conform to the parameters of *Waters*," as plaintiff asserts (Pltf. Let. Br. at 2).

Plaintiff attempts to minimize *Waters* by referring to the Supreme Court as "deeply divided." (Pltf. Let. Br. at 4) Contrary to the impression left by plaintiff, however, and as noted in defendants' main letter-brief, the *Waters* court favored the defendant-supervisors by a margin of seven to two. In addition to the four justices who wrote the plurality opinion, three concurring justices would have gone further in recognizing a public employer's prerogatives by eliminating the requirement that a defendant's belief about the likelihood of harm be reasonable.

Significantly, even plaintiff ultimately concedes that, "[i]n *Waters*, as in *Connick*, the Court determined that a reasonable expectation is a sufficient basis for termination of an employee, even where no actual disruption has been or can be shown." Pltf. Let. Br. at 6. Plaintiff then goes on to say that "*Waters* requires, however, that the government act in good faith and that when judging the employer's acts the Court 'should look to the facts as the employer reasonably found them to be,' *Waters*, 114 S.Ct. 15 1889." Pltf. Let. Br. at 6. Plaintiff appears to have forgotten that this issue was resolved against him. The six defendants held liable here were found by the jury to have reasonably believed that Jeffries' speech would harm the University. Having failed to seek to vacate that finding, either at the trial level or on appellate review, plaintiff may not now recast to his own liking "the facts as CUNY reasonably found them to be at the time it took action" (Pltf. Let. Br. at 6-7) or seek to have this Court recast those facts itself. Accordingly, plaintiff's assertions that defendants could not possibly have held a reasonable belief that the speech would affect the Uni-

versity (Pltf. Let. Br. at 4, 6) are simply not cognizable by this Court at this juncture.[2]

Plaintiff's attempt to distinguish the instant case from *Waters* and the cases cited in defendants' main brief on appeal, as not involving "a direct criticism of the employer or a practice or policy of the employer" (Pltf. Let. Br. at 4), also fails. First, nothing in *Waters*, or any of its predecessors, suggests that only speech focused upon criticism of supervisors can justify employment action.[3] The test is whether the speech can reasonably be believed by the employer to be likely to be disruptive. Speech which, as here, brought discredit upon an institution and seemed likely to make it more difficult to recruit students and faculty, or maintain good working relationships among existing students and faculty, is actionable regardless of its target. In any event, Jeffries' admitted references to "the head Jew at City College" and "my Jews at City College," could readily be interpreted as criticism.

Similarly, there is nothing in *Waters*, *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), or any of the other precedents cited by plaintiff to suggest that public universities are to be treated differently from other public employers for the purposes of *Pickering* analysis. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), dealt

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[2] Plaintiff's assertion that his speech did not have an actual impact is irrelevant. As plaintiff himself admits, and as defendants established in their main letter-brief, *Waters* holds that a demonstration of actual impact is not a prerequisite to action against a public employee on the basis of his speech.

[3] *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), which was cited with approval in *Rankin v. McPherson*, 483 U.S. 378, 391 n.18 (1987), clearly did *not* involve criticism of supervisors.

with the constitutionality of a State requirement that faculty at a State university disclose whether they had ever been members of a communist organization, not *Pickering* balancing.[4]

Plaintiff's letter contains a multitude of other inaccuracies, which cannot all be addressed here.[5] Nowhere, however, does plaintiff provide this Court with any basis for avoiding the clear import of *Waters*, that defendants' reasonable predictions of harm entitled them to a reversal of the decision below or, at a minimum, a new trial, with appropriate instructions, and qualified immunity.

Respectfully submitted,

/s/ Kathie Ann Whipple
KATHIE ANN WHIPPLE

cc: Joseph Fleming, Esq.
Kenneth S. Stern, Esq.
Sheldon D. Camhy, Esq.

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[4]Plaintiff's extra-legal arguments concerning *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992) (Pltf. Let. Br. at 7), should be ignored. *Levin* involved a faculty member, not a chair, and was decided on different facts, long before *Waters*.

[5]Plaintiff's discussion of Jeffries' role as Chair, for example (Pltf. Let. Br. at 2), omits any reference to section 9.1c of the Bylaws, the operative provision in a reappointment decision. (EA151) Section 9.1c, contrary to plaintiff's representation, explicitly contemplates a "college-wide" role for chairs.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1993

No. 953

(Argued: January 21, 1994
Decided: April 18 1994)

Docket No. 93-7876

LEONARD JEFFRIES,

Plaintiff-Appellee,

v.

BERNARD HARLESTON, individually and in his official capacity as president of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Defendants-Appellants,

BLANCHE BERNSTEIN,

Defendant.

Before: VAN GRAAFEILAND and McLAUGHLIN, *Circuit Judges,* and BURNS, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York (Conboy, *J.*). Following a jury verdict in favor of a controversial professor at City College of New York, the district court found that defendant university officials violated his First Amendment rights by limiting his term as Black Studies department chairman, and that defendants' acts were unprotected by qualified immunity. The district court ordered defendants to reinstate the professor as department chairman, and awarded punitive damages against six defendants.

Held: defendants did violate the professor's First Amendment rights; defendants were not shielded by immunity; and reinstatement was an appropriate remedy. We find inconsistencies in the jury's special verdict responses and we vacate the punitive damage awards and remand for new trial solely on that issue.

AFFIRMED in part, VACATED in part, and REMANDED.

KATHIE ANN WHIPPLE, Deputy Bureau Chief, Office of the Attorney General of the State of New York, (Robert Abrams, Attorney General of the State of New York, Jerry

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*Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

Boone, Solicitor General of the State of New York, Clement Colucci, Assistant Attorney General, Roy P. Moskowitz, Assistant General Counsel to the City University of New York, of counsel) *for Defendants-Appellants.*

JOSEPH FLEMING, New York, NY (Melinda E. Weekes, Debra Ann Galloway, New York, NY, of counsel) *for Plaintiff-Appellee.*

Sheldon D. Camhy, Adrian Zuckerman, Lawrence A. Steckman, Camhy Karlinsky & Stein, New York, NY, Robert A. Machleder, New York Regional Board of the Anti-Defamation League, New York, NY, *for amicus curiae Anti-Defamation League.*

Kenneth S. Stern, Samuel Rabinove, Wendy Lecker, Penina Goldstein, New York, NY *for amicus curiae American Jewish Committee.*

McLAUGHLIN, *Circuit Judge*:

In the summer of 1991, Leonard Jeffries was the Black Studies department chairman at City College of New York ("City College"), and he was the keynote speaker at an off-campus symposium on black culture. He spoke predominantly on the bias he perceived in New York State's public school curriculum. During the speech, Jeffries made several derogatory statements, particularly about Jews. The speech ignited a firestorm of controversy, the upshot being the decision by university offi-

cials to reduce Jeffries' upcoming term as department chairman from three years to one.

Jeffries sued the university officials in the United States District Court for the Southern District of New York (Kenneth C. Conboy, *Judge*), alleging that they reduced his term because of the content of his speech, in violation of the First Amendment. After a jury trial, the district court found six of the 14 defendant officials liable for violating Jeffries' rights. The court reinstated Jeffries as department chair, and awarded him $360,000 in punitive damages.

The defendants appeal, arguing that: (1) they did not abridge Jeffries' free speech rights; (2) they are protected from damage awards by the doctrine of qualified immunity; (3) reinstatement was improper; and (4) the punitive damage awards should be vacated as inconsistent with the Jury's special verdict findings.

We hold that defendants violated Jeffries' right to free speech, and that the defendants are not shielded by qualified immunity. We also affirm the reinstatement order because it was an appropriate equitable remedy given the nature of the harm suffered. Because we find that the jury's responses were inconsistent with an award of punitive damages, however, we vacate these awards and remand for new trial on punitive damages.

BACKGROUND

The facts are largely undisputed.

A. *The Parties*

Jeffries is a professor at City College, and the chairman of the Black Studies department there. Bernard Harleston is the President of City College, which is part of the City University of New York ("CUNY") system. Ann Reyn-

olds is the Chancellor of CUNY. James Murphy is the Chairman of CUNY's Board of Trustees; Edith Everett is Vice-Chair. The remaining defendants are CUNY Trustees.

Jeffries has chaired the Black Studies department since its creation in 1972. The CUNY by-laws state that a chairman's term lasts three years. Jeffries' sixth consecutive term was due to expire June 30, 1991, and on June 5, the Black Studies professors nominated him to another term as chairman.

At CUNY, faculty nominations for department chairs are subject to the approval of the City College President and the CUNY Board of Trustees. Because Jeffries' term was up at the end of June 1991, the Board should have voted on Jeffries at its June meeting. Due to an administrative error, however, the Board did not act on Jeffries' reappointment at that meeting. Despite the absence of formal Board action, Harleston sent Jeffries a letter on July 1 congratulating him on his reappointment. The letter did not mention that the Board had yet to approve his selection.

B. *The Speech*

On July 20, Jeffries delivered his now notorious speech in Albany, at the Empire State Black Arts and Culture Festival. Jeffries was introduced to the audience as the chairman of City College's Black Studies department, and as a former member of a committee organized to review the New York public school curriculum's treatment of minorities. The Festival was not affiliated with CUNY in any way.

Jeffries spoke for more than an hour, primarily criticizing the racial and ethnic biases he perceived in the public school curriculum. During the speach, Jeffries made several comments about Jews that were hateful and repug-

nant. For example, Jeffries launched several *ad hominem* invectives at specific state and federal officials who supported the curriculum, calling one an "ultimate, supreme, sophisticated debonair racist," and a "sophisticated, Texas Jew." Jeffries also told his audience that Jews had a history of oppressing blacks. He said that "rich Jews" had financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to "put together a system of destruction of black people" by portraying them negatively in films.

C. *The Aftermath*

Jeffries' speech, which was initially broadcast on an Albany television station, received extensive media attention in the New York City area. On August 8, Harleston released a statement condemning Jeffries for undermining CUNY's policy of striving toward racial, ethnic and religious harmony, and indicating that he would "initiate a thorough review of this situation." Reynolds, Murphy, and Everett issued a press release the same day, saying that CUNY would "examine Professor Jeffries' actions and statements and, if warranted, . . . pursue vigorously with City College the remedies that may be appropriate and available. . . ."

Over the next few weeks, Reynolds and Harleston discussed with other CUNY administrators the possibility of removing Jeffries as department chairman. Harleston asked the City College Provost and the Dean of the Social Sciences division to review Jeffries' performance as department chair since July 1 to determine whether the publicity surrounding the speech hampered his ability to run the department.

One week later, the Social Sciences Dean sent Harleston a memorandum concluding that Jeffries had met his

"ordinary administrative responsibilities . . . during an extraordinary period of time." The Dean also cautioned, however, that his review was perfunctory, and that he would submit a follow-up report.

The Provost subsequently reported to Harleston that he had interviewed several people within and without the Black Studies department; according to the Provost, all of those interviewed stated that Jeffries was carrying out his duties adequately. The Provost told Harleston that Jeffries was scheduling courses, running department meetings, recruiting faculty, keeping records, and representing the department at meetings.

Harleston was not satisfied by these two reports on Jeffries' performance. He decided to recommend to the Board of Trustees that they reappoint Jeffries to only a one-year term—instead of the customary three-year term—as department chairman. Reynolds endorsed this planned recommendation. Neither Harleston nor Reynolds investigated whether the Albany speech would impair Jeffries' interaction with Jewish faculty, stigmatize the department or university, or dissuade benefactors from providing financial support.

D. *The Board Meetings*

The Board of Trustees met in late October, with Jeffries' reappointment on the agenda. Harleston recommended that the Board limit Jeffries' term to one year. The Vice-Chancellor for Legal Affairs, an attorney, warned the Trustees that they could not sanction Jeffries based on the content of his speech. Despite the Vice-Chancellor's admonition, Trustees Edith Everett, Herman Badillo, Blanche Bernstein, and Harold Jacobs voted to reject Jeffries' nomination outright, candidly explaining that their decision rested on the content of his speech.

Nine other Trustees voted for Harleston's recommendation, however, and approved a one-year term for Jeffries, to expire at the end of June, 1992. (Trustee Sylvia Bloom abstained from the vote because she had made statements earlier criticizing Jeffries' views.)

Harleston wrote Jeffries of the Board's vote. In his letter, Harleston said that the speech threatened recruitment, fundraising, and CUNY's relationship with the community.

The Provost and Social Sciences Dean made oral follow-up reports to Harleston on Jeffries' performance. They recounted angry exchanges that Jeffries initiated with faculty and administrators regarding his limited term, as well as a bizarre tantrum that Jeffries threw during an interview with a student reporter from Harvard. In December, Harleston decided to replace Jeffries as chairman.

On March 20, 1992, three days before the next Board of Trustees meeting, Harleston announced to the Black Studies department that he planned to recommend that the Board approve Professor Edmund Gordon, retired chairman of Yale University's African-American studies department, to succeed Jeffries in July. Although CUNY by-laws state that the President should confer with the department faculty when choosing a replacement chairman, Harleston had not done so. The faculty opposed Gordon as a candidate, and chastised Harleston for selecting a department chair without consultation.

At the Board meeting, the Trustees voted unanimously to replace Jeffries with Gordon. The defendants gave conflicting testimony about whether, at this meeting, the Trustees discussed Jeffries' performance.

E. *The Proceedings Below*

In June 1992, Jeffries sued Harleston, Reynolds, and the 14 Trustees under 42 U.S.C. §1983, alleging that he was removed from the department chair in violation of his First Amendment right to free speech. Jeffries sought reinstatement and punitive damages.

At trial, Jeffries introduced a CUNY by-law provision outlining the responsibilities of a department chairman. The by-laws state that the chairman is charged with carrying out the policies of the department, faculty, and Board of Trustees. They list the chairman's duties to include department recordkeeping, assigning courses to department faculty, representing the department at internal CUNY meetings, presiding over department meetings, helping to draft department budget proposals, and evaluating department professors who are up for tenure review.

Jeffries also introduced a summary of the district court opinion in *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). In *Levin*, another controversial CUNY professor had sued Harleston and other CUNY officials for retaliating against him because of his disparaging off-campus statements about blacks. There, the district court ruled that CUNY had violated the professor's First Amendment rights.

The defendants objected that the *Levin* summary was inadmissible because its probative value was substantially outweighed by its prejudicial effect. Judge Conboy admitted the summary, however, because it was probative of defendants' knowledge and state of mind when they limited Jeffries' term.

For their part, the defendants offered evidence that Jeffries was an ineffective chairman, and that they would

have denied him a three-year term even if he had not given the speech.

To focus the jury's attention on the proper issues, Judge Conboy submitted four specific questions for the jury to answer. The jury returned the following responses:

> 1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department? "YES."
>
> 2. Have the defendants shown by a preponderance of the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech? "NO."
>
> 3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University? "NO."
>
> 4. If the answer to question #3 was no, have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University? "YES."

With this special verdict in hand, Judge Conboy balanced Jeffries' speech interest against the defendants' interest in running CUNY efficiently. He found that the subject of Jeffries' speech—the state public school curriculum—substantially involved a matter of public concern. Judge Conboy then noted that the jury had found that

Jeffries' speech did not interfere with CUNY operations. Based on these findings, he concluded that Jeffries' interests were greater, and, accordingly, that the defendants had violated his First Amendment rights.

Judge Conboy then submitted to the jury a second verdict sheet, requiring a specific determination as to each defendant's individual liability. The jury responded that Jeffries had proven by a preponderance of the evidence that six defendants (Harleston, Reynolds, Everett, Badillo, Bloom, and Jacobs) took action against Jeffries because of his speech, and that these defendants would not have limited Jeffries' term had he not given the speech. The jury found that Jeffries had failed to make this showing as to the other defendants, however.[1]

On a third verdict sheet, the jury was asked to determine whether any of the six liable defendants had "acted with malicious intent to violate the plaintiff's rights under the First Amendment . . . or with malicious intent to unlawfully injure him, or . . . with a callous or reckless disregard of the plaintiff's First Amendment rights." If any defendants were found to have such an intent, the jury was required to decide whether, and how much, to award in punitive damages against the culpable parties.

The jury found that all six defendants were liable for punitive damages, apportioned as follows: Harleston—$30,000, Reynolds—$50,000, and Badillo, Bloom, Everett, and Jacobs—$80,000 each. The district judge reduced Harleston's amount to $15,000, and Reynolds' to $25,000.

Jeffries then petitioned the court for a permanent injunction to reinstate him as chairman. The defendants

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[1] Bernstein died before trial and was not included in this verdict sheet.

opposed the injunction, and moved to overturn the jury's verdict on the grounds that the evidence was insufficient and that they were shielded by qualified immunity. The defendants also moved that the court vacate the punitive damage awards as inconsistent with the jury's response to question four in the first special verdict.

In a published opinion, Judge Conboy denied the defendants' motion and ordered Jeffries reinstated as department chairman. *See Jeffries v. Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993). He noted that there was substantial evidence that Jeffries' speech motivated the defendants to act, and that defendants had offered little credible evidence that they had limited his term for other legitimate reasons. Judge Conboy also ruled that the defendants were not protected by qualified immunity because, in light of the *Levin* decision, they should have known that they could not retaliate against an employee for speech on matters of public concern.

In addition, Judge Conboy rejected the defendants' argument that the special verdict findings were inconsistent with the punitive damage awards:

> the jury could have reasonably found that while a majority of the defendants had a reasonable expectation that the plaintiff's July 20, 1991 speech would cause hampering of the efficient and effective operation of the University, the six defendants found liable did not have this reasonable expectation.

Finally, finding that the balance of equities weighed in Jeffries' favor, Judge Conboy ordered the defendants to reinstate Jeffries as department chairman for two years.

DISCUSSION

On appeal, the defendants argue that the district court erred because: (1) the defendants did not violate Jeffries' First Amendment rights; (2) they were shielded from liability by qualified immunity; (3) reinstatement was improper; and (4) the punitive damage awards were inconsistent with the special verdict findings. We address these arguments in turn.

I. *The First Amendment*

Central to our constitutional democracy is the right to speak on political or social matters without fear of retribution by the government. *See generally Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, *J.*) (freedom of speech is "the indispensable condition of nearly every other form of freedom"). This freedom does not vanish when the views expressed jar majoritarian sensibilities. As Justice Holmes observed 75 years ago:

> [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). More recently, Justice Harlan has added: "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 25 (1971).

This protection against government retaliation for speech extends also to the government's own employees, although the need for an efficiently functioning government must be factored into the balance. *See Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Accordingly, when a public employee expresses an opinion on a matter

of social or political concern, even if critical of the very government that employs him, his employer cannot sanction him unless his speech has impaired the efficiency of government operations. *See id.* at 379-80, 383 (data entry clerk in sheriff's office may not be fired for expressing to co-workers her hope that next attempt on President Reagan's life succeeds); *Piesco v. City of New York*, 933 F.2d 1149, 1159-60 (2d Cir. 1991) (city official cannot be fired for publicly criticizing her own department where there is no evidence that her statements actually hampered the department's functioning), *cert. denied*, 112 S.Ct. 331 (1992). *Compare Dambrot v. Central Michigan Univ.*, 839 F.Supp. 477, 487 (E.D. Mich. Nov. 23, 1993) (university could fire coach for racial remarks to players in locker room during halftime pep talk because the players' poor performance was "not the kind of question that is fairly cast as a 'public' issue").

To determine whether the government violated an employee's free speech rights, the employee's interest in speaking on matters of public concern must be balanced against the government's interest in rendering public services efficiently. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). We review *de novo* the district court's balancing of interests. *See Connick v. Myers*, 461 U.S. 138, 150 n.10 (1983).

To establish a *prima facie* case that the government fired an employee in violation of his free speech rights, the employee must demonstrate that the speech: (1) involved a matter of public concern; and (2) was a substantial or motivating factor in the government's decision to fire him. *See Frank v. Relin*, 1 F.3d 1317, 1328-29 (2d Cir.), *cert. denied*, 114 S.Ct. 604 (1993). The former is a question of law; the latter, of fact. *Id.* at 1329.

Jeffries' speech unquestionably involved public issues. The speech criticized the public school curriculum (and its supporters) for reflecting bias against minorities, and discussed the history of black oppression. These issues are suffused with social and political hues. True, the tenor of Jeffries' speech was less than ingratiating, and, as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it. But First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[S]o long as the means are peaceful, the communication need not meet standards of acceptability.").

Jeffries also satisfied the second *Pickering* prong. The evidence substantially supported the jury's finding that defendants' decision to remove Jeffries was motivated by the content of the Albany speech. Before the speech, Harleston was eager to send premature congratulations to Jeffries on his reappointment. After the speech, Harleston asked two administrators to determine whether Jeffries was performing his duties as chairman adequately. Even though both reported favorably on Jeffries' performance, Harleston proceeded to recommend that the Board reappoint Jeffries for only a one-year term.

Then, the Board, with no evidence that Jeffries' performance was deficient or that the speech threatened to harm CUNY, voted to limit Jeffries' term. Four Trustees voted against reappointment outright, candidly conceding that they did so because of the content of Jeffries' speech. Likewise, at the next Board meeting, where the Board approved Gordon as the new department chairman, several Trustees admitted at trial that Jeffries' performance was not discussed at all.

The jury, therefore, had ample basis to find that the speech was the impetus for the defendants' action. Thus, Jeffries' speech was a substantial or motivating factor behind the vote to limit his term, and Jeffries has made out a *prima facie* case.

Even though the employee makes out a *prima facie* case that the defendants sanctioned him for his speech, the defendants may still escape liability by showing either that: (1) they would have fired the employee regardless of the speech; or (2) the employee's conduct interfered with the "effective and efficient fulfillment of [defendants'] responsibilities to the public." *Frank*, 1 F.3d at 1329 (quoting *Connick*, 461 U.S. at 150).

Having carefully reviewed the record, we agree with the district court that the jury could reasonably have concluded that the defendants would not have removed Jeffries but for the speech. It was only after the speech that Harleston began expressing concerns about Jeffries' performance; not three weeks before, he had congratulated Jeffries on his reappointment. While the defendants offered evidence that Jeffries had exchanged heated words with other CUNY personnel regarding CUNY's reaction to his speech and had berated a student reporter from Harvard, there was no evidence that these incidents were ever considered by the Board as a reason to deny reappointment. The record shows that the Trustees did not remove Jeffries for any reason other than his speech.

Nor have the defendants shown that Jeffries' speech interfered with CUNY's operation. *See Frank*, 1 F.3d at 1329. Generally, interference in this context entails impairing employer discipline, causing disharmony among co-workers, disrupting close working relationships where loyalty and confidence are essential, failing to perform one's duties, or frustrating the regular operation of the

government enterprise in question. *See Pickering*, 391 U.S. at 570-73.

How much interference the government must show to justify sanctioning an employee for his speech will vary, depending on the degree that the speech involved matters of public concern. *See Connick*, 461 U.S. at 146-47. If the speech only tangentially touched on public issues, the government need not wait until "the disruption of the office and the destruction of working relationships is manifest" before taking action. *Id.*, 461 U.S. at 152. If, alternatively, the speech substantially addressed public issues, the government must show the statements "actually undermined the effective and efficient operation" of the employee's department. *Piesco*, 933 F.2d at 1159. Because, as we held above, Jeffries' speech substantially concerned public issues, the defendants shoulder the weightier burden of showing that the speech caused substantial disruption at CUNY.

Endeavoring to lighten their burden, the defendants argue that they need only demonstrate a reasonable expection that Jeffries' speech would eventually cause disruption because Jeffries held a highly visible, policymaking position. True, the government generally has more discretion to sanction an employee who serves in a "confidential, policymaking, or public contact role" than one who performs ministerial functions, *Rankin*, 483 U.S. at 390-91 (1987) (the employee's responsibilities determine whether his statement "somehow undermines the mission of the public employer"); *Piesco*, 933 F.2d at 1157 (a high-ranking public official must act with caution when commenting on matters integral to that person's official responsibilities); *Hall v. Ford*, 856 F.2d 255, 261 (D.C. Cir. 1988) (government's burden of proving interference is less stringent when the employee holds

a position for which loyalty is essential). The defendants, however, have not shown how Jeffries, by virtue of his position as department chair, could undermine CUNY's mission with his speech. *See Rankin*, 483 U.S. at 390. The CUNY by-laws charge the department chairman with carrying out the policies of the department, faculty, and Board of Trustees. They do not vest him with the power to make policy. Further, the department chairman performs an essentially ministerial role: He keeps department records, assigns courses to teachers, represents the department at internal CUNY meetings, drafts department budget proposals, leads departmental meetings, and makes departmental tenure evaluations.

In addition, the evidence suggests that, within CUNY, department chairs are perceived as ministerial positions. When Harleston asked the Provost to evaluate Jeffries' performance, the Provost focused solely on whether Jeffries had completed the ministerial tasks listed in the by-laws. He did not examine Jeffries' interpretations of CUNY policy, his contact with the public, or the like. Nor did the defendants introduce any other evidence at trial to show that department chairmen have special duties of loyalty or confidentiality, or that they have more public contact than an ordinary professor. While a department chair may be a position of prestige, it does not call for the level of institutional fidelity that would justify the lesser interference burden.

In short, to rebut Jeffries' *prima facie* case, the defendants must show substantial interference. We find that the defendants have provided meager evidence at best that Jeffries' speech had any real disruptive effect on CUNY operations, and thus, have fallen short of their burden.

Finally, the defendants argue that Jeffries failed to show that they caused his deprivation, as required by section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978). The defendants reason that: (1) only four of the 13 voting Trustee defendants were found liable for retaliating against Jeffries because of his speech (Harleston and Reynolds were not Trustees); (2) these four could not have caused Jeffries' deprivation because the other nine Trustees voted to limit Jeffries' term for constitutionally permissible reasons. We disagree.

A plaintiff may establish causation under section 1983 if he shows that the defendants participated in, or were "moving forces" behind, the deprivation. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 819-20 (1985); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-61 (1st Cir. 1989) (causation includes participating in an affirmative act, or "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.").

Under this standard, all six defendants found liable have "caused" Jeffries' deprivation. Defendants Harleston and Reynolds, while not Trustees, appear, nevertheless, to have been prime movers behind CUNY's effort to take action against Jeffries; Harleston himself was singularly responsible for proposing that the Board of Trustees approve Jeffries for only a one-year term. Thus, they were "moving forces" behind the vote. In addition, by voting at another meeting to replace Jeffries with Gordon, Trustees Badillo, Bloom, Everett and Jacobs participated in the act (voting) that caused Jeffries' deprivation (removal from the department chair).

Accordingly, we affirm the district court's finding that the defendants violated Jeffries' First Amendment rights.

II. *Qualified Immunity*

The defendants contend that even if they did violate Jeffries' rights, the damage awards should be vacated because the defendants, as government officials, enjoy qualified immunity.

The doctrine of qualified immunity balances society's need to allow public officials to discharge their duties without fear of litigation against the individual's interest in being safe from official abuse. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 813-15 (1982); *Zinker v. Doty*, 907 F.2d 357, 359 (2d Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). Thus, qualified immunity shields state actors from liability for their official acts unless they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1063-64 (2d Cir.), *cert. denied*, 114 S.Ct. 185 (1993).

A right is "clearly established" if it meets one of three tests: (1) it is defined with reasonable clarity; or (2) the Supreme Court or this Circuit has affirmed its existence; or (3) a reasonable defendant would understand from existing law that his acts were unlawful. *White Plains Towing*, 991 F.2d at 1064. *See generally Malley v. Briggs*, 475 U.S. 335, 341 (1986) (the doctrine does not shield "the plainly incompetent or those who knowingly violate the law").

The defendants should have known from existing law that they could not remove Jeffries from the department chair on the basis of his speech. By July 20, 1991, both the Supreme Court and the Second Circuit had held repeatedly that, absent a disruption of government operations, a public employer may not sanction an employee

for speaking on issues of social or political concern. *See, e.g., Rankin*, 483 U.S. at 379-80, 383 (1987) (clerk in sheriff's office wrongfully fired for saying that she hoped next assassination attempt on President Reagan was successful); *Pickering*, 391 U.S. at 574 (teacher could not be fired for publicly criticizing school's athletic budget or for questioning character of school administrators); *Piesco*, 933 F.2d at 1159-60 (high-ranking city administrator wrongfully fired for telling a legislative committee that a "moron" could pass the police entrance exam) (decided June 3, 1991); *Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990) (it is "objectively unreasonable" for university administrators to retaliate against professor solely because of his public speech).

In the face of this overwhelming precedent, the defendants argue that the right was not clearly established because no court had specifically addressed whether a public university might limit a department chairman's term on the basis of his speech. The defendants, in effect, believe they can act as they choose until there is a case on all fours. We reject such jural insouciance. The defendants should have known their actions were illegal from the decisions reproving closely analogous conduct. *See Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980) ("A prior judicial decision holding conduct such as appellants' to be a basis for suit was not necessary to apprise them of a rule which should come as no surprise . . . ."), *cert. denied*, 451 U.S. 970 (1981). *See also Vasbinder v. Ambach*, 926 F.2d 1333, 1341 (2d Cir. 1991). Indeed, two of those decisions, *Pickering* and *Dube*, specifically involved public school teachers.

This abundance of precedent alone would justify our rejection of defendants' qualified immunity defense.

Here, however, the defendants had further notice that their actions were illegal. One month before the first Board meeting, Harleston and other CUNY officials lost a lawsuit in which a professor claimed that CUNY stigmatized him on the basis of statements he made outside the classroom. *See Levin v. Harleston*, 770 F.Supp. 895 (S.D. N.Y. September 4, 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). The *Levin* district court opinion was a clarion call to the defendants that sanctioning Jeffries for his speech was unconstitutional.[2]

Finally, we note that the Trustees were advised at the first Board meeting by CUNY's own Vice Chancellor of Legal Affairs that they could not act against Jeffries based on his speech.

For these reasons, we hold that the defendants were not shielded by qualified immunity.

III. *Reinstatement*

The defendants also argue that the district court should not have ordered them to reinstate Jeffries as department chairman. Essentially, their position is that the injunction would have unduly harsh public consequences because Gordon, the replacement chosen by the Board, is a more effective department chairman.

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[2]The defendants argue that the district court improperly allowed the jury to see a summary of the district court's opinion in *Levin* because it suggested to the jury that the defendants had a propensity to commit first amendment violations.

While evidence of prior bad acts may not be admitted to show propensity, it may come in for other purposes, such as to show state of mind. Fed. R. Evid. 404(b). Here, the summary of the *Levin* opinion was highly probative to show that the defendants knew that they were not allowed to punish faculty members for extracurricular expression. The *Levin* summary was relevant on the issues of liability and punitive damages, and thus was properly admitted.

An injunction is proper when the plaintiff has suffered a constitutional violation that causes continuing irreparable injury for which the law provides no adequate remedy. *See New York State Nat'l Org'n for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989), *cert denied*, 495 U.S. 947 (1990). In determining whether to issue an injunction, the court should balance the relative injuries to the parties and should consider the public consequences. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

We find that reinstatment was well within the district court's discretion. The defendants violated Jeffries' right to free speech by limiting his term as department chairman. And, as the district court noted, the department chair is a position of prestige, both inside and outside CUNY. Unremedied, the violation constitutes a continuing loss of that prestige, further aggravated by the cloak of disgrace that surrounded Jeffries' removal. Further, he has no remedy at law for this injury. *See Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) ("[I]rreparable injury means injury for which a monetary award cannot be adequate compensation. . .").

On balance, we find that Jeffries' injury outweighs any detriment to the public from having Jeffries as department chairman for two more years. We affirm the reinstatement order.

IV. *Punitive Damages*

Punitive damages may be awarded for a constitutional violation where the defendant's conduct was driven "by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). They

are imposed to "punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." *Restatement (Second) on Torts* §908 cmt. a (1979). Accordingly, punitive damages should be reserved for a case where the defendant acted with a degree of malice akin to the *mens rea* required for most crimes. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). *See also* William L. Prosser, *Handbook of the Law of Torts* 9 (4th ed. 1971).

The defendants argue that we should vacate the punitive damage awards against Harleston, Reynolds, Everett, Badillo, Bloom and Jacobs because they are inconsistent with an earlier jury finding. Specifically, they note that, in response to question four on the first special verdict form, the jury found that the defendants were motivated in their actions by a "reasonable expectation" that Jeffries' speech would disrupt the effective and efficient operation of CUNY. The defendants regard this finding as inconsistent with the jury's subsequent finding that six of the defendants acted with malicious intent or reckless indifference. We agree.

The Seventh Amendment's right to trial by jury will not tolerate a judgment based on a material inconsistency in the jury's verdict. *Finnegan v. Fountain*, 915 F.2d 817, 820 (2d Cir. 1990). On the other hand, respect for the right to trial by jury counsels that in reviewing a jury's special verdict responses, we prefer a reading that reconciles apparent inconsistencies. *See Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529 (2d Cir. 1992). Where we cannot harmonize the jury's responses rationally, however, the Seventh Amendment requires that we vacate the judgment and order a new trial. *See id.* at 529-30; *Finnegan*, 915 F.2d at 820; *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988);

Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975).

In *Finnegan*, for example, the plaintiff sued a police officer under section 1983 for using excessive force when arresting her. The jury was given two special verdict sheets. On the first, it found that the officer acted in the good faith belief that he was using reasonable force; on the second, the jury found he acted maliciously, wantonly, and oppressively. *Finnegan* held that these verdicts flatly contradicted each other, and, accordingly, that the judgment could not stand. *Id.* at 821. *See Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984) (jury finding that officer did not know actions were illegal contradicts finding that his actions were shocking, callous, and brutal).

We believe the jury responses here, like those in *Finnegan*, are hopelessly irreconcilable. The defendants could not have acted with a reasonable expectation that Jeffries' speech would harm CUNY, and also with malice or reckless indifference. If defendants' actions were motivated by a reasonable expectation of harm to CUNY, the court could not award punitive damages; if they acted maliciously or with reckless indifference, such awards would be proper. *See Restatement (Second) on Torts* §908 cmt. b ("[P]unitive damages may be awarded because of . . . wrongful purpose or intent. . . . Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like. . . .").

The district court—understandably, given the time and resources it had invested in this prickly litigation—sought to harmonize the jury's responses by interpreting the first response to mean only that "a majority of the defendants" reasonably expected the speech would harm CUNY, and the second response to declare which defendants did *not* act with such a reasonable expectation. We

find this interpretation more ingenious than ingenuous. There is no fair way to read the first verdict response so narrowly. There is a threshold of clarity that a jury verdict should cross, particularly when it awards punitive damages based on a finding of malice or recklessness. The legal and moral consequences of such a finding are too serious to leave the finding to conjecture and surmise.

Accordingly, we vacate the punitive damage awards against Harleston, Reynolds, Everett, Badillo, Bloom, and Jacobs, and remand for a new trial to decide whether Jeffries should recover punitive damages from these six defendants.

CONCLUSION

In sum: We affirm the district court's holding that the defendants violated Jeffries' First Amendment rights; we affirm that defendants were not shielded by qualified immunity; and we affirm the order reinstating Jeffries to his department chair for two years; however, we vacate the award of punitive damages and remand for a new trial solely on that issue.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 Civ. 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

v.

BERNARD HARLESTON, et al.,

Defendants.

ORDER

KENNETH CONBOY, DISTRICT JUDGE:

This trial commenced on April 22, 1993, and the jury submitted its initial verdict on May 10, 1993. There were five questions on the First Verdict Form, which the jury answered as follows:

1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department? "Yes."

2. Have the defendants shown by a preponderance of the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech? "No."

3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University? "No."

4. If the answer to question #3 was "no," have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University? "Yes."

5. Has the plaintiff proven by a preponderance of the evidence that the defendants deprived him of property without due process of law? "Yes."

To begin, the Court notes that the jury found that the defendants violated the plaintiff's rights under the fourteenth amendment, in that they deprived the plaintiff of property without due process of law.

Having received the determinations of the jury with respect to the factual issues underlying the first amendment allegations, the Court must now balance the interests of the plaintiff Leonard Jeffries "in commenting upon matters of public concern," against the interests of his employer, City University, "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Tp. H. S. Dist. 205, Ill.*, 391 U.S. 563, 568 (1968).

In performing this balancing test, the Court must determine the degree to which Professor Jeffries' July 20, 1991 speech involved matters of public concern. In making this determination, the Court looks to the "content, form, and context of a given statement as revealed by the

whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Professor Jeffries made his speech at the Empire State Black Arts and Cultural Festival in Albany, New York, in a function that was wholly unconnected with City University. The speech was made in response to and as part of an ongoing debate concerning the importance of teaching different perspectives in the classrooms of this country. The subject of the debate and the content of the speech concerned the reform of the educational curriculum to reflect the multicultural values and experiences of different minorities in the United States. In fact, Professor Jeffries had been retained by the State of New York to advise a task force appointed by New York State Education Commissioner, Thomas Sobol, to study the status of the curriculum in the state's public schools and the treatment of people of color in that curriculum (*See* Plaintiff's "Affidavit in Support of Plaintiff's Motion for Summary Judgment," para. 7). Professor Jeffries was given the task of researching the impact of the public school curriculum on African Americans. Following publication of the task force's findings, a storm of controversy broke over the participants, who then proceeded to attack each other. The ensuing debate absorbed the energies of the press and commentators on the American scene, across the nation. Indeed, in his speech, Professor Jeffries responds to criticisms that had been leveled at him and his ideas by others in both academic and political life.

Reviewing the record with respect to Professor Jeffries' July 20, 1991 speech, the Court finds that the speech substantially involved matters of public concern and "should be accorded significant weight in the *Pickering* balance." *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1157 (2d Cir.), *cert. denied*, 112 S.Ct.

331 (1991). The speech was part of a debate that has broad and extremely significant implications for American society. Possible reform of the educational curriculum, and the introduction of multicultural perspectives in the classroom, to whatever degree thought prudent, represent a critical dialogue that reaches the deepest political and social values of the United States. While it is quite understandable that some may consider certain statements in Professor Jeffries' speech to be offensive, these statements do not dilute the high degree of public concern that is at the core of the speech.

On the other side of the scale, the Court must weigh the right of the University to function effectively and efficiently. In weighing this right, the Court defers to the jury's factual findings. The jury found that Professor Jeffries' July 20, 1991 speech did not hamper the effective and efficient operation of the Black Studies Department, the College, or the University. However, the jury also found that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University.[1]

The question facing the Court is whether the defendants, in order to outweigh the free speech rights of the

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[1] We observe that at least one Circuit court has held that in performing the balancing test required by *Pickering* a "court must defer to [the jury's] factual findings, unless the [ ] [findings] are totally unsupported by the record." *Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987). However, the authority is unclear in this Circuit as to the obligation of trial courts to make factual determinations when balancing the *Pickering* factors. Accordingly, we have made an independent review of the evidence in this case, and we agree with the jury's factual findings.

plaintiff, must show actual hampering of the effective and efficient operation of the Black Studies Department, the College, or the University, or whether the "reasonable expectation" that the plaintiff's speech would cause disruption is enough to overcome the plaintiff's first amendment rights. We recognize that in *Connick* the Supreme Court stated that it did "not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152. However, the Supreme Court cautioned "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.*

Many courts since *Connick* have held that where a public employee's speech substantially involves matters of public concern, the defendants must show *actual* hampering of the effective and efficient operation of the governmental services in order to outweigh the employee's first amendment rights. A showing that the defendants were motivated in their actions by a "reasonable expectation" that the employee's speech would cause the disruption of the effective and efficient operation of the government office is insufficient. *See, e.g., Piesco*, 933 F.2d at 1159-60; *Melton v. City of Oklahoma City*, 879 F.2d 706, 715-16 (10th Cir. 1989); *Roth v. Veteran's Admin. of Government of United States*, 856 F.2d 1401, 1407 (9th Cir. 1988); *Matherne v. Wilson*, 851 F.2d 752, 761 n.53 (5th Cir. 1988); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir.), *cert. denied*, 488 U.S. 899 (1988).

Because the jury found no actual hampering and because we have found that the plaintiff's speech substantially involved matters of public concern, we hold that the plaintiff's interest in making his speech outweighs

the University's interest in the effective and efficient operation of its services. Accordingly, the Court finds that the University's denial to Professor Jeffries of a full three-year term as Chairman of the Black Studies Department constitutes a violation of plaintiff's first amendment rights.

We will, therefore, submit the first amendment claim with the fourteenth amendment claim to the jury for further deliberations on the questions of individual liability and punitive damages.

SO ORDERED

/s/ Kenneth Conboy
KENNETH CONBOY, U.S.D.J.

Dated: New York, New York
May 11, 1993

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
92 CIV 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

v.

BERNARD HARLESTON, et al.,

Defendant.

Kenneth Conboy, District Judge:

As a preliminary matter, the Court must determine whether the speech at issue in this case, Professor Jeffries' July 20, 1991 speech at the Empire State Black Arts and Cultural Festival, is constitutionally protected. Speech is constitutionally protected if its content is a matter of public concern. Speech touches upon matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 103 S.Ct. at 1690. *See also Johnson v. Lincoln Univ. of Com.*, 776 F.2d 443, 452 (3rd Cir. 1985). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record." *Connick*, 103 S.Ct. at 1690.

Both sides agree that Professor Jeffries' speech, taken in its entirety, touches upon matters of public concern. *See* Transcript of Hearing, April 20, 1993. The Attorney

General contends, however, that particular sections of the speech, the sections that allegedly motivated the defendants' actions, do not touch upon matters of public concern and, therefore, do not deserve constitutional protection.

We reject the Attorney General's contention that the Court can dissect a speech, which both sides concede is constitutionally protected in its entirety, so as to eliminate constitutional protection for particular shards or phrases that might be considered offensive. In *Rankin v. McPherson*, 107 S.Ct. 2891 (1987), the plaintiff, a clerical employee in a county Constable's office, and a coworker were discussing the policies of the President of the United States. At the conclusion of the discussion, the plaintiff commented upon an assassination attempt against the President, stating, "if they go for him again, I hope they get him." 107 S.Ct. at 2895. Plaintiff's last remark was overheard by another employee, who reported the statement to the Constable. As a result, plaintiff was fired. The Supreme Court found that plaintiff could not be fired for the last remark, because the remark was in the context of a conversation discussing the President and his policies and was, therefore, constitutionally protected. Similarly, in this case, the Court must look to the entire context of the speech to determine whether particular sections touch upon matters of public concern.[1] Because the statements upon which the Attorney

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[1] The *Rankin* Court stated that the "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a public concern. '[D]ebate on public issues should be uninhibited, robust, vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " 107 S.Ct. at 2898, *quoting, New York Times Co. v. Sullivan*, 84 S.Ct. 710, 721 (1964).

General seeks to rely were made in the context of and were part of a speech concerning a matter of public concern, we find that these statements are constitutionally protected.

Having found that Jeffries' speech touches upon matters of public concern, the Court will not allow the Attorney General to splice and fragment the accompanying constitutional protection in a manner that would severely weaken the constitutional safeguard and might well distort the full, contextual meaning of the speech. Accordingly, the Court finds that Jeffries' whole speech, each and every sentence, is constitutionally protected. *See Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3263 (1987) ("The task under *Pickering* is to balance those competing interests and to determine whether the employee's interests in the *speech as a whole* outweigh the public employer's interests." *Id.* at 957 n.6) (emphasis added); *Moore v. City of Kilgore, Tex.*, 877 F.2d 364 (5th Cir.), *cert. denied*, 110 S.Ct. 562 (1989) ("Finally, we turn to an analysis of the form of Moore's comments. They do involve a hint of personal 'employee' considerations. . . . However, mixed motivations are involved in most actions we perform everyday; we will not hold Moore to herculean standards of purity of thought and speech, ever assuming Moore's motivations were mixed. Taking Moore's *speech as a whole*, and considering the content, context, and form together, we hold that Moore's speech does involve a matter of public concern—the effectiveness of the Fire Department in fighting fires." *Id.* at 371-72) (emphasis added); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) ("The use of profane words by themselves, in my opinion, does not preclude a finding that an employee's speech addresses a matter of public concern.

Instead, as *Connick* indicates, the record *as a whole* must be examined. *Martin v. Parrish*, 805 F.2d at 587 (Concurrence)) (emphasis in original).

The Attorney General next urges that the defendants be permitted to offer testimony to the jury that they were in fact motivated in the actions they took only by the assertedly antisemitic portions of the speech. We observe parenthetically that in taking this position the defendants may be conceding a part of the plaintiff's burden of proof—specifically, that the protected speech was a substantial or motivating factor in the defendants' actions. *See Johnson v. Lincoln Univ. of Com.*, 776 F.2d 443, 452 (3rd Cir. 1985).

The Court will allow the admission of evidence concerning the particular sections of the speech that motivated defendants' actions. However, both sides should be aware that the fact that the defendants were motivated by only particular sections of the speech is in no way a defense to the civil allegations. It is our present intent to instruct the jury accordingly.

SO ORDERED.

/s/ Kenneth Conboy
Kenneth Conboy, U.S.D.J.

Dated: New York, New York
April 21, 1993

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
92 CIV 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

v.

BERNARD HARLESTON, et al.,

Defendant.

ORDER

Kenneth Conboy, District Judge:

Plaintiff, a tenured professor at the City College of the City University of the City of New York, has filed a complaint against officials and trustees of the College and the University asserting, in substance, that his position as Chairman of the Black Studies Department, which he had held for twenty years, was terminated as a result of a speech he gave in Albany, New York on July 20, 1991. This speech was widely reported in the media and characterized by some commentators as being anti-semitic and denounced by numerous officials and faculty members of the College and University. Professor Jeffries seeks an order declaring that his first amendment right to free speech has been abridged and that his civil rights have been violated by the defendants, and directing the defendants to restore him to the chairmanship.

All parties apparently are in agreement that Professor Jeffries' Albany speech was in content and substance a form of expression wholly protected by the First and Fourteenth Amendments of the Constitution. The defendants assert that the speech, and by implication, the widespread criticism of the speech, the speaker and the College and University officials who tolerated the continuing presence of Professor Jeffries on the faculty, played no role in the termination of his chairmanship. Professor Jeffries' stewardship of his chairmanship provided a basis for his dismissal as chairman, according to the defendants, and they point to a post-speech investigation conducted by the Provost and Dean of the College to support this finding. The plaintiff asserts that the speech was the sole, or at least, the principle motivating factor behind the action of the College and University officials that caused the loss of his chairmanship.

Professor Jeffries points to the following sequence of events in urging the Court to grant him summary judgment:

a) plaintiff's re-election to the Chairmanship of his Department by the faculty thereof;

b) acceptance of plaintiff's re-election, without reservation or stipulation, as of July 1, 1991, by President Harleston with the concurrence of Dean Rosen and Provost Pfeffer;

c) plaintiff's July 20, 1991 Speech;

d) defendants immediate condemnation of plaintiff because of his Speech;

e) President Harleston's appointment of Provost Pfeffer to review the plaintiff's performance as Chair as a result of the Speech;

f) Faculty Senate rejection of any punitive action against plaintiff at its September 19, 1991 meeting;

g) Provost Pfeffer's October 4, 1991 Report to Harleston, supported by Dean Rosen's review, confirming that plaintiff was functioning well as Chairman;

h) President Harleston's direction to Provost Pfeffer and Dean Rosen that they continue to review plaintiff's Chairmanship;

i) Board of Trustees October 28, 1991 vote limiting plaintiff's appointment as Chair to one (1) year rather than customary three year term;

j) November decision by defendants to remove plaintiff;

k) March 1992 vote by Board of Trustees removing plaintiff as Chair, effective July 1, 1992.

In suport of his motion for summary judgment, plaintiff submits an affidavit, dated February 24, 1993, in which he notes the report of Provost Pfeffer, dated October 4, 1991, to President Harleston of the College. There, the Provost stated that "although you and others in the administration might have had questions concerning Professor Jeffries' performance as Chair prior to July, 1991, Presidential approval of his re-election as Chairperson (without any stipulations), appears to negate the relevancy of any previous information concerning his performance." Professor Jeffries further cites the September 19, 1991 Memo of Dean Rosen to Provost Pfeffer, specifically, the following passage: "I have decided to limit my observations to Professor Jeffries actions as Chair since his re-election to that post last spring: a re-election which was, as you know, accepted by President Harleston. I must assume that the acceptance of the outcome of that election implies that neither the words or deeds of Professor Jeffries prior to last spring

provided sufficient reason to over-ride the vote of the department at that time."

In light of these statements about Professor Jeffries' performance *before* the speech, he argues that defendants' are limited to a review of his performance *after* the speech, and that defendants can point to no misconduct or deficiency after the date of the speech that could serve as a justification for the termination of his chairmanship.

Accordingly, plaintiff points out, and defendants do not dispute, that the post-speech inquiry by Provost Pfeffer and Dean Rosen was ordered by President Harleston, to explore the *effect* of the speech on the ability of Professor Jeffries to effectively perform his duties as chairman. Notwithstanding the fact that the inquiry by Provost Pfeffer and Dean Rosen found no basis to conclude that the speech had impeded Dr. Jeffries in the carrying out of his duties, defendant Harleston's letter to the plaintiff, dated October 29, 1991, stated that he was still concerned about the speech and would continue to monitor the professor's actions.

For purposes of the motion before us, plaintiff urges that he is entitled to summary judgment because it is undisputed that as of July 1, 1991 there existed no reason to deny Professor Jeffries his duly elected three year term as Chairman of the Black Studies Department, that the cause of the reviews and other actions taken by the College leadership and University Trustees against Professor Jeffries was his speech of July 20, 1991 and that the justification offered by the defendants for the dismissal of Professor Jeffries, that "black scholars in the field" had criticized plaintiff's stewardship of his department, is not supported by the record. *See*, affidavit of Joseph Fleming, dated February 24, 1993, 2-3.

Defendants insist that they are entitled to summary judgment, principally upon the grounds that, following the July 20, 1991 speech "Dean Rosen and Provost Pfeffer came to the conclusion that plaintiff's performance as chair had deteriorated in a variety of respects. They became aware of a confrontation with another member of the faculty, delays in an important faculty search, deficiencies concerning the monitoring of grading, teaching of classes, and maintenance of records, failure to attend meetings, and other problems. During the same period, plaintiff confronted Harleston in a manner Harlestone deemed inappropriate. He and the chancellor also became aware of allegations of inappropriate conduct by plaintiff at City College, one by a reporter, one by a student." Defendants' Statement Pursuant to Local Rule 3(g) dated February 11, 1991, ¶ 17.

It is apparent from an examination of the records and documents submitted by the Attorney General on behalf of the defendants to support the aforementioned claims, that these materials could be found by a jury to have been assembled selectively for the self-serving purpose of creating an after the speech justification for removing Professor Jeffries from his chairmanship. This is so because much of what is relied upon to justify removal of Professor Jeffries occurred before the Speech, and did not impede his reappointment to the chairmanship three weeks before the speech. We also observe that ritualistic incantation of the business records exception to the hearsay rule does not meet problems of multi-tiered hearsay in such documents.

The central issue in this case, as the Attorney General concedes, is the defendants' motives. Memorandum of Law in Opposition to Plaintiff's Motion For Summary Judgment and in Support of Defendants' Cross-Motion

For Summary Judgment, dated February 11, 1993, 10-11 ("Defendants' Memo").

Claims involving First Amendment rights of public employees are governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny, which require first, that the speech at issue "be fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Ezekwo v. New York City Health and Hospitals Corp.*, 940 F.2d 775, 781 (2d Cir. 1991).

Second, the employee must prove that the speech was a substantial or motivating factor in the adverse employment decision. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. at 287; *Ollman v. Toll*, 518 F.Supp. 1196 (D. Md. 1981), *aff'd*, 704 F.2d 139 (4th Cir. 1983).

Third, the court must balance the interests of the employee, "as a citizen, in commenting upon matters of public interest and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra*, 391 U.S. at 568. *See also Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Ezekwo, supra*, 940 F.2d at 780.

Fourth, the government employer must be given an opportunity to prove that it would have reached the same decision even without considering the protected conduct. *Id.*

Cases requiring a *Pickering* analysis are, as the Attorney General concedes, ill-suited for summary judgment. Defendants' Memo, 1. *See, Albisher v. Ryan*, 622 F.2d 651, 654-55 (2d Cir. 1980). Furthermore, as the underlying facts are quite unsettled and even contradictory

in the Attorney General's own submission, we are not satisfied that a showing that defendants' are entitled to a finding of qualified immunity at this stage of the proceedings has been made.

Nor are we satisfied that the record supports Plaintiff's motion for summary judgment, given the factual dispute over motive that is at the heart of the case.

Accordingly, the cross-motions for summary judgment are in all respects denied. The case will proceed to trial on April 20, 1993. This is a final and irrevocable trial date, and no adjournment will be granted.

SO ORDERED.

Dated: New York, New York
March 31, 1993

/s/ Kenneth Conboy
KENNETH CONBOY, U.S.D.J.

APPENDIX K

VERDICT FORM #3–PUNITIVE DAMAGES

Jeffries v. Harleston, *Et Al*, 92 Civ. 4180 (KC)

1. Do you find that the plaintiff has proven by a preponderance of the evidence that BERNARD W. HARLESTON acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that BERNARD W. HARLESTON acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

2. Do you find that the plaintiff has proven by predonderance of the evidence that BERNARD W. HARLESTON acted with malicious intent to deprive the plaintiff of property without due process of law or with malicious intent to unlawfully injure him or that BERNARD W. HARLESTON acted with a callous or reckless disregard of the plaintiff's right not to be deprived of property without due process of law?

yes __x__ no _____

3. If the answer to question #1 or #2 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against BERNARD W. HARLESTON, what is the appropriate amount?

$30,000.00

4. Do you find that the plaintiff has proven by a preponderance of the evidence that W. ANN REYNOLDS

acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that W. ANN REYNOLDS acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes x no _____

5. Do you find that the plaintiff has proven by a preponderance of the evidence that W. ANN REYNOLDS acted with malicious intent to deprive the plaintiff of property without due process of law or with malicious intent to unlawfully injure him or that W. ANN REYNOLDS acted with a callous or reckless disregard of the plaintiff's right not to be deprived of property without due process of law?

yes x no _____

6. If the answer to question #4 or #5 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against W. ANN REYNOLDS, what is the appropriate amount?

$50,000.00

7. Do you find that the plaintiff has proven by a preponderance of the evidence that EDITH B. EVERETT acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that EDITH B. EVERETT acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes x no _____

8. If the answer to question #7 is "yes," you may decide to award punitive damages, or you may decide not to

award them. If you decide to award punitive damages against EDITH B. EVERETT, what is the appropriate amount?

$80,000.00

9. Do you find that the plaintiff has proven by a preponderance of the evidence that HERMAN BADILLO acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that HERMAN BADILLO acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

10. If the answer to question #9 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against HERMAN BADILLO, what is the appropriate amount?

$80,000.00

11. Do you find that the plaintiff has proven by a preponderance of the evidence that SYLVIA BLOOM acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that SYLVIA BLOOM acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

12. If the answer to question #11 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against SYLVIA BLOOM, what is the appropriate amount?

$80,000.00

13. Do you find that the plaintiff has proven by a preponderance of the evidence that HAROLD M. JACOBS acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that HAROLD M. JACOBS acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes x no _____

14. If the answer to question #13 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against HAROLD M. JACOBS, what is the appropriate amount?

$80,000.00

APPENDIX L

The City University of New York

University Faculty Senate
535 East 80th Street
New York, N.Y. 10021
Telephone - 212-794-5538

February 1, 1995

Honorable Judges of the United States
Court of Appeals for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: *Jeffries v. Harleston*
Docket No. 93-7876

Honorable Judges:

This letter brief is submitted in behalf of the University of New York as *amicus curiae* in the above-captioned case. For the reasons set forth below, we believe that the Supreme Court's holding and reasoning in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994), is inapplicable and should not be extended to the unique "marketplace of ideas" that defines the university. To apply *Waters v. Churchill* to the educational setting would place at serious risk that exchange of viewpoints and open dialogue which form a cornerstone for intellectual pursuit, learning and academic freedom.

The University Faculty Senate

The University Faculty Senate exists pursuant to Section 8.14 of the by-laws of the Board of Trustees of the City University of New York (hereinafter the "Board"), as implemented by the Charter of the University Faculty Senate of the City University of New York (hereinafter the "University"). In pertinent part, these by-laws establish that the University Faculty Senate (hereinafter the "Senate") is "responsible, subject to the board, for the formulation of policy relating to the academic status, role, rights and freedoms of the faculty." The Senate is a self-governing body comprised of delegates from all of the units of the University. Given its charge and composition, the Senate is a unique body which seeks to express the collective opinion of the academic community which is most vitally affected by the outcome of this case.[1]

The Academic Setting

In reaching its decision in this case, the court must be mindful of the academic context in which it is cast. Over the years the United States Supreme Court has addressed itself to situations directly or indirectly related to academic communities. As a consequence, a body of law has developed in recognition of the right of academics to teach without hindrance. This basic protection has broadened over the years to embrace extra mural utterances, and even utterances critical of the employing

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[1] In appearing herein as *amicus curiae*, the Senate seeks to convey views independent of the University or of Professor Jeffries. For the purpose of this appearance it has no interest in the success or failure of either of the parties, although statements in this brief may be viewed at support of one or the other.

institutions. At the same time, the class of protected groups has been broadened to include public school teachers and students, as well as the educational institutions themselves.

The importance of free inquiry in all branches of knowledge and "the dependence of a free society on free universities" is a long standing premise. *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Justice Frankfurter concurring). Indeed, in *Sweezy*, the Supreme Court noted that "the essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250. Later, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court, while striking down as unconstitutional state statutory provisions meant to weed out "subversive employees" from state employment, rejected the premise that "public employment, including academic employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian v. Board of Regents, supra*, at 605. In reaching its decision, the Court stressed that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." *Id.* at 603. In *Keyishian*, the Court struck themes that resonate with significance to this day on the role of the university and have particular relevance to the adjudication of the case at bar. The court eloquently explained that

> "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future

depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Id.* (citations omitted).

Waters v. Churchill Should Not be Applied to the Academic Setting and Should be Limited to Analogous Factual Situations

In *Waters*, the Court addressed the difference between the government as sovereign and the government as employer and the greater latitude it possesses in the latter context to limit speech otherwise protected by the First Amendment. The Court explained that the "extra power" of the government as an employer "comes from the nature of the government's mission . . ." *Waters v. Churchill, supra*, at 1887. It then broadly stated that "[g]overnment agencies are charged by law with doing particular tasks [and] hire employees to help do those tasks as effectively and efficiently as possible." *Id.* However, the role or *mission* of the "government as employer" is obviously not the same in all contexts but encompasses a variety of situations which are factually and functionally distinct. Yet, the Court did not engage in any discerning analysis of the disparate governmental interests at stake in different employment contexts and necessarily left this for determination by the lower courts on a case-by-case basis.

We believe that any extension of *Waters* must take into account the specific nature of the governmental work and "agency mission" involved and that *Waters'* reasoning is not transferable to the academic setting. *Waters* must be understood for what it is: a narrow decision involving the kind of evidence upon which a public employer may

rely in order to discipline an employee for unprotected speech. The Court's foray into the underlying rationale for the government's heightened authority over speech when it acts as employer paints with too broad a brush and is unavailable as precedent for the case at bar.

Waters does not and can not fit into the unique environment of the university. As the precedents discussed *supra* demonstrate, the mission of the university is education and is premised on a free flow of ideas. What may be "disruptive" speech in other public employment contexts, is an intrinsic part of higher eduction. Disagreement, contentious and even angry speech are not disruptive in this setting but are part of the social fabric of the university. Difference of opinion is not disruption, it is expected, valued and encouraged. The application of *Waters* to the academic setting would have a "chilling effect" on all faculty speech. *See* Terrence Leas and Charles J. Russo, *Waters v. Churchill: Autonomy For The Academy Or Freedom For the Individual?* 93 Education Law Reporter 1099 (1994). Faculty participation in the governance of the university would be seriously compromised. Faculty speech on such matters as curriculum, academic standing, admissions and related subjects would be held hostage to the charge of "disruption."[2]

In *Waters*, the Court attempted to distinguish between the kind of speech that the government could control as

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[2]That faculty speech on thse matters would constitute speech on issues of great public concern protected by the First Amendment is beyond peradvanture. This is especially so at the City University of New York, a public institution at the center of learning in a very large metropolitan area, with a charter to provide educational opportunities to a diverse population. What criteria will be used for admission and what will be taught is of critical concern to that population and the diversity that it represents.

employer but not as sovereign. As an example, it stated that "surely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vauge when applied to the public at large." *Id.* at 1886-1887. But what are the implications of this ill-defined distinction? Is this true, as the court implies, in all public employment contexts? The implications of such a vague and sweeping approach are startling when applied to the educational setting. Should we set a standard that a professor can be disciplined for being "rude" to students—the "customers" of the university? How is rudeness in this context defined? Should the expression of an idea that offends a student be considered rude and hence punishable by the public employer? To ask the question demonstrates the incongruity of applying the test of rudeness in an academic setting. The point is simply that in determining the parameters of protected speech and in balancing such speech against the potential for disruption, a particularized inquiry must be undertaken into mission of the public employer at issue and the tasks involved in accomplishing the mission.[3]

Free Speech and the Public Employee

In analyzing the impact of *Waters v. Churchill* to the instant case, it is important to consider two free speech holdings of the United States Supreme Court that deal with the rights of public employees, namely *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983).

Pickering involved the dismissal of a high school teacher for making partially inaccurate statements criti-

[3] This court itself has examined the speech in question and the issue of disruption in light of "CUNY's mission." *Jeffries v. Harleston*, 21 F.3d 1238, 1247 (2nd Cir. 1994).

cizing the budgetary policies of the school board in a letter to the editor of a local newspaper. No evidence was presented at a board hearing that the letter had any detrimental impact on the efficient operation and administration of the schools under the board's jurisdiction. An Illinois Supreme Court decision upholding the board's termination of Pickering was reversed by the United States Supreme Court.

In *Pickering*, the Court recognized that teachers had the same First Amendment rights as other citizens, and could use those rights to comment upon the operations of the schools in which they worked. The Court rejected the notion that public employees relinquish their constitutional rights as a condition of employment. At the same time, the Court recognized the interests of the State of Illinois as an employer as distinct from its relationship to the citizens of that State in general. In went on to say:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education, supra*, at 568.

Connick presented a somewhat different picture to the Court. In this case, Myers, an assistant district attorney, resisting a transfer to another post in the office, not only voiced her opposition to her supervisors, but also distributed a questionnaire to her colleagues which, by implication, criticized various internal policies of the office (including alleged pressure to work in political campaigns) and questioned the level of worker confidence in their supervisors. Myers was discharged shortly thereafter and brought suit alleging violations of her First

and Fourteenth Amendments rights. Reversing the courts below, the Court held that there was no violation of the plaintiff's constitutional rights, inasmuch as the opinions she expressed did not involve matters of public concern but constituted an employee's grievance concerning "internal office policy." What was characterized as her "limited First Amendment interest" was not sufficient to overturn Meyers' discharge.

In *Waters v. Churchill, surpa*, Churchill, an obstetrics nurse who had earlier received an evaluation critical of an alleged insubordinate remark, was overheard criticizing a hospital official and the employer's training and staffing policies. The remarks were made to a fellow nurse who was considering a transfer into the obstetrics unit. When alleged details of the conversation reached Waters, Churchill's supervisor, a series of meetings took place among hospital administrators who, after verifying accounts of the conversation, discharged Churchill on the ground that her behavior undermined the administration of the public hospital. After grieving unsuccessfully, she sued in federal court, claiming her speech was addressed to matters of public concern and thus protected under *Connick*. Her case was dismissed in the district court on a motion for summary judgment. The Court of Appeals reversed, holding that Churchill's speech, viewed in its most favorable light, was protected. It also held that the inquiry must turn on the actual speech and not on what the employer believed was said. The Supreme Court vacated the judgment and remanded the case for trial. According to the Court, the issue was "whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said." *Waters v. Churchill, supra*, at 1882.

In the course of its decision, the Supreme Court stated that it was necessay not only to insure that the First Amendment was upheld but that the substantive standards of the First Amendment be applied through reliable procedures. Thus, *Waters* presents both substantive and procedural aspects. The substantive aspects were not dealt with at all, as the actual content of the speech presented triable issues of fact. Hence, *Waters v. Churchill* says nothing conclusive about the substance of the First Amendment question presented by the case at bar. Substantively, this court is still presented with a choice of whether the instant case is controlled by *Connick* or *Pickering*. We submit that in the present posture of the case, the court has correctly analogized the facts to *Pickering* rather than *Connick*. Our interpretation is reinforced by a comparison of the respective organizational settings of *Waters* and the case at bar.

As we noted previously, the nature of the professional setting may contextualize and give scope to critical speech protected by the First Amendment. However, a hospital setting must allow less protection than that of a university. In a hospital, insubordination poses obvious risks to the essential mission of the employer. The university, however, lives on controversy and debate both within and outside of the classroom. It is also marked by a high degree of self-governance, in which, however imperfectly, the faculty makes policy. While faculty at CUNY do not exercise managerial authority, like many other university faculties, they exercise a substantial degree of policy control. In that atmosphere, respect for differences of opinion and trenchant criticism must be very high in order for the university to function. As we discussed more fully above, the Supreme Court has for some time given special consideration to the unique

circumstances of academic communities and the integral role of free speech across the spectrum of activities within that setting.

Whether we are dealing with speech within or outside the university makes no essential difference in determining the First Amendment rights of the faculty. In the case at bar we are dealing with a speech addressing matters of public concern made outside of the university where the full panoply of *Pickering* rights apply, and where *Connick* does not apply. *Waters v. Churchill*, which deals with a different set of facts in a starkly different organization environment, is inapplicable here.

While *Waters v. Churchill* has little to say about the substantive rules of the First Amendment, its discussion of procedure is of great importance. The Court cautioned that it was "important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." *Id.* at 1884. While the Court did not articulate a procedural test to be applied universally, it stated that "the propriety of a proposed procedure must turn on the particular context in which the question arises . . ." *Id.* at 1886.

In discussing the nature of the evidence upon which the employer may rely in making its employment decision, the Court in *Waters* concluded that it did not believe that a reviewing court "must apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions." *Waters v. Churchill, supra*, at 1889. We believe that, at minimum, an investigation is required into both the substance of what was said and the alleged disruption it caused. Thus, while the Court noted that it has historically accorded "substantial weight

to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern . . ." (*Id.* at 1887), such reasonableness can only be achieved by investigation and not speculation.

The University Has Failed to Satisfy Procedural First Amendment Guarantees

In the instant case not only has the University transgressed upon substantive First Amendment rights, it has failed to meet the procedural requirements set by the Supreme Court in *Waters v. Churchill.* The University does not question that the speech at issue involved matters of public concern. *Waters* requires that once it is established that speech by a government employee touches upon a public concern, the public employer must show that its interests as employer in furthering the efficiency of a public service outweighs the interests of the employee to freedom of speech protected by both the First and Fourteenth Amendments. *See Connick v. Meyers, supra.*

As we argue above, Waters requires that a public employer must conduct an investigation into the likely consequences of an employee's speech. Here, the University made no such investigation. It made no attempt to show that the speech interfered with the proper functioning of the University by "impairing employer discipline, causing disharmony among co-workers [or] disrupting close working relationships where loyalty and confidence are essential . . ." *Jeffries v. Harleston*, 21 F.3d 1238, 1246 (2nd Cir. 1994). Nor did the University demonstrate that the consequences of the speech "disrupted the classroom, administration [or] fund-raising." *Jeffries v. Harleston*, 828 F.Supp. 1066, 1071 (S.D. N.Y. 1993).

Where a public employee has made a speech about a subject of public concern, it is not sufficient that the employer show a speculative undifferentiated fear of possible harmful consequences. Rather, the employer must show that, at minimum, it undertook a "reasonable" investigation into the potential for disruption. The failure of the University to conduct such an investigation is fatal to its case. Without such an investigation, the University cannot claim that its prediction of disruption was reasonable.[4]

Conclusion

For the reasons discussed above, we believe that application of *Waters v. Churchill* to the academic setting would grieviously impair the ability of faculty to exercise fundamental free speech rights essential to the preservation of academic freedom.

Respectfully submitted,

/s/ Arthur L. Galub
Arthur L. Galub, Chair
University Faculty Senate Legal Affairs Committee, on behalf of the University Faculty Senate

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[4] Nor is the standard for such procedural safeguards so easily met. In *Waters*, the Court noted that public debate may gain much from the informed opinion of government employees; and that "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill, supra*, at 1887. In such instances, First Amendment considerations would necessarily play a role in any government employment decisions. As the Court stressed "[i]n many such situations the government may have to make a *substantial* showing that the speech is, in fact, *likely* to be disruptive before it may be punished." *Id.* (citations omitted, emphasis added). The University has clearly failed to make this showing here.

APPENDIX M

CITY COLLEGE OF NEW YORK
OF
THE CITY UNIVERSITY OF NEW YORK

September 19, 1991

OFFICE OF THE DEAN
OF SOCIAL SCIENCE

TO: Provost Robert Pfeffer

FROM: Dean Jeffrey Rosen

RE: Preliminary evaluation of Professor Jeffries recent performance as Chairman of Black Studies

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As per your request, I have prepared this initial assessment as to whether recent events have impaired Professor Jeffries' actual performance as Chairperson. I have decided to limit my observations to Professor Jeffries' actions as Chair since his re-re-election to that post last spring; a re-election which was, as you know, accepted by President Harleston. I must assume that the acceptance of the outcome of that election implies that neither the words or deeds of Professor Jeffries prior to last spring provided sufficient reason to over-ride the vote of the department at that time.

I have also decided to limit my observations to Professor Jeffries' actual administrative performance as Chair and not to consider his verbal statements per se. I have made this decision on the basis of my understanding of the possible implications of the recent Conboy decision, currently being appealed.

With these constraints and given this date, my observations are necessarily limited. Nonetheless, they include the duties of the Chair in the following:

1) Fall 1991 registration

2) Scheduling of Classes for Spring, 1992

3) Attendance at Divisional P & B meetings

4) Scheduling and convening regular Departmental meetings

5) Organizing current faculty search efforts

1) Registration and the beginning of classes coincided with the most intense period of press coverage and public outcry over the Albany episode. Nonetheless, and despite the additional complications brought about by Professor Davidson's resignation and Professor Manigat's illness, courses were covered and appropriate cancellation decisions made in a timely fashion.

2) The spring course schedule has been submitted to me on time and, folliwing consultation and minor revision, approved.

3) The first Divisional P & B meeting is scheduled for 9/24 at 2:00 p.m. Professor Jeffries' secretary has called to confirm this time, and I fully expect him to attend and participate.

4) I have been asked in writing to attend the first Departmental meeting of the Black Studies Faculty scheduled for 9/25 at 3:00 p.m. The meeting was called by Professor Jeffries.

5) I have received a copy of the memo sent by Professor Jeffries to Professor Kiteme, Chair of the Faculty Search Committee, to schedule a meeting of that committee to invite me to attend. That meeting is tentatively scheduled for 9/25 and following the Department meeting.

Parenthetically, I have neither received reports of, nor observed any difficulties with either Professor Jeffries classes, or of any of the department courses, over the time-frame covered by this report.

In summary then, the ordinary administrative responsibilities of a department Chair have been met during an extraordinary period in time. Nonetheless, the time span covered by this report is both too brief and, in many respects, too atypical to support any broad generalizations. I will, therefore, submit a follow-up report to you by the end of next week and, thereafter, upon your request.

APPENDIX N

THE CITY COLLEGE
of
The City University of New York
New York, N.Y. 10031

Office of the
Dean of Social Science

(202) 600-8155

TO: Provost Robert Pfeffer

FROM: Dean Jeffrey Rosen

SUBJ: Dr. Leonard Jeffries, Black Studies Department

DATE: October 2, 1991

This is a follow-up to my memo of 9/19/91 regarding the recent performance of Professor Jeffries as Chair of Black Studies. During the week of 9/23 I had occasion to meet with Professor Jeffries on four occasions in his capacity as Chair. On 9/23 he and I met to discuss a set of issues related to the current search in Black Studies. On 9/24 he attended and participated in a Divisional P&B meeting. On 9/25 I attended the first half hour of the Department Faculty meeting to discuss several matters and answer questions and concerns of this body. On 9/23 Professor Jeffries and I met again on matters related to the search and the Department. All of the aforementioned interactions were productive, collegial, and altogether unextraordinary.

During the week of 9/30 Professor Jeffries and I met on 9/30, again to discuss Departmental matters. On 10/2 I attended a special departmental faculty meeting, convened to discuss both the current administrative

review of Professor Jeffries, as well as matters pertaining to the future of the Department.

I am sure you are aware that the foregoing represents an unusually high frequency of interaction between a Chair and a Dean. This atypical incidence of interaction is in part a function of the problems that confront Professor Jeffries and his Department, and in part a reflection of his efforts to help find a potentially constructive outcome to these problems. In brief, any Chairperson worthy of the position would be expected to do no less under these circumstances.

(Five attachments are included.)

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APPENDIX O

THE CITY COLLEGE

THE CITY UNIVERSITY OF NEW YORK
Convent Ave. at 138 St.
New York, New York 10031

Office of the
Vice President for Academic Affairs
and Provost

(212) 600-6638

CONFIDENTIAL

October 4, 1991

To: President Bernard W. Harleston

From: Provost Robert Pfeffer

Topic: Administrative Review of Leonard Jeffries Jr.

On September 12, 1991, I received a request from you to "undertake a review of Dr. Leonard Jeffries' leadership of the Black Studies Department to determine whether Dr. Jeffries can continue to act effectively as departmental administrator and as a participant in the formation, development, and interpretation of college-wide interests and policy." (Appendix IA) Included in that charge you state the "focus of this review is whether Dr. Jeffries can now provide effective leadership as Chair of the Black Studies Department in light of the impact his public statements have had, if any, upon the present operations of the College, and his department, the ideas he has expressed, including the speech he recently delivered in Albany, are not germane to this review."

On September 13, 1991 you publicly notified The College Community about the administrative review. In a memorandum addressed "Dear Colleague" you stated that the Provost will undertake "an administrative review as to whether the Chair of the Black Studies Department can carry out the duties and responsibilities as Chair, as defined by the Bylaws of The City University of New York." (Appendix 1B) The following report and documentation address both of these written charges particularly in light of Article IX of the Bylaws of The City University of New York, and your letter to The College Community of March 15, 1985, concerning the responsibilities of persons elected or appointed to leadership roles in The College.

The Bylaws of the City University of New York, in Article IX, describe the Organization and Duties of Faculty Departments. In Section 9.1c, it is stated that, "In any case where the president does not approve the election of a department chairperson, or at such other time as the interests of the college may require the removal of a chairperson and the appointment of a new one, he/she shall confer with the department and thereafter shall report to the board any subsequent action by the department with respect thereto, together with his/her own recommendation for a chairperson. . . . The president shall base his/her recommendation on the capacity of the individual selected to act effectively as the departmental administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy." (Appendix 11A)

In your March 15, 1985 memorandum to The College Community, referring to the reported remarks of Professor Jeffries to a candidate for the International Studies position, you state that "there is no place at City College

for racism, anti-semitism, ethnic snobbism, or any other attitude that denies equality among individuals. Those who are appointed or elected to leadership positions in the College have an added responsibility to insure that attitudes and values that deny equality among individuals are neither directly nor indirectly supported or reinforced. This is a necessary condition for responsible administrative leadership at City College." In the closing paragraph of the same document you state that, "I am determined not to permit any action or behavior that will give support to such an unfair and untrue representation of what this College stands for." (Appendix IIB)

Given that your charge of September 12, 1991 specifically states that "ideas he (*Professor Jeffries*) has expressed, including the speech he recently delivered in Albany, are not germane to this review," I believe that your sentiments regarding fitness for leadership roles at the College stated in the March 15, 1985 memorandum can not be applied to my current review, since the parameters of the charge prevent me from investigating Jeffries' remarks on or off campus in relation to his performance as chair. Furthermore, Professor Jeffries' election as chairperson was approved by you three times since the 1985 memorandum. (Professor Jeffries was reelected as chairperson of the Black Studies Department in spring 1985, 1988 and most recently spring 1991.) On July 1, 1991 you wrote Professor Jeffries a letter of congratulations on his election as chairperson stating "I look forward to working with you and your department," . . . "I am confident that with your assistance and guidance and with the help of your Executive Committee, we will continue to serve the students and citizens of the City College as an educational institution of the highest quality." (Appendix III)

By examining the preceding documentation, it becomes evident that I am restricted to reviewing Professor Jeffries' performance as chairperson from July 1, 1991 (the commencement of his newly elected term as chair) through the present. Although you and others in the administration might have had questions concerning Professor Jeffries' performance as chair prior to July 1991, Presidential approval of his reelection as chairperson (without any stipulations), appears to negate the relevancy of any previous information concerning his performance. Thus, I have conducted my review of Professor Jeffries' as a departmental administrator since July 1, 1991, the beginning of his most recent appointment.

I formulated the following questions to Dean Rosen, the Social Science R&B Committee, and the faculty of the Black Studies Department in order to determine if Professor Jeffries has been fulfilling his duties as chair.

1) Is Professor Jeffries, given the impact of his public statements, the notoriety, the press and media attention, etc., still functioning as chair of the department?

2) Is he carrying out the duties of the chair as stated in the Bylaws of City University section 9.3? (Appendix IV)

In light of the limited time that has been available for observations (3 months), it is difficult to ascertain whether all of the duties of the chairperson have been fulfilled to date. However, Dean Rosen (see Appendix VA and VB) and the Social Science P&B Committee indicate that Professor Jeffries appears to be functioning this semester at least as efficiently as over the last 10 years, and probably more so. As noted by Dean Rosen's memos to me, Professor Jeffries has assigned courses and arranged programs of instruction for staff members of

the department, called and presided over the meetings of the department, attended the divisional P&B Committee meetings, and is organizing current faculty search efforts. He has been meeting with Dean Rosen very regularly to keep him apprised of his activities.

At a special Social Science P&B Committee on September 26, 1991, I discussed these questions directly with Professor Jeffries' colleagues. All of the members of the P&B were in attendance with the exception of Jeffries who was invited, but felt he should not be present. (Attending were: Dean Rosen, Professors Bayer, Silver, Goldberg, McKenna, Laderman and Crain). Although his peers indicated that he does represent the Black Studies Department and is continuing to perform his duties in the same manner as before, there was disagreement about the specific charge. Professor Silver argued that Jeffries' entire record including the Albany speech needs to be considered as part of the review and attached is Professor Silver's September 26, 1991 memo to me which was distributed at the P&B meeting. (Appendix VI) Professor Silver insists that the AAUP Guidelines specify that inclusion of a professor's remarks is acceptable and appropriate.

According to *Academic Freedom and Tenure* A Handbook of the American Association of University Professors (Appendix VII, P. 36)

> "The College or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his

> profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

Furthermore, ". . . an administration may file charges in accordance with procedures outlined in the *Statement* if it feels that a faculty member has failed to observe the above admonitions and believes that his extramural utterances raise grave doubts concerning his fitness for his position." (Appendix VII, P. 64)

Within the Social Science P&B there are considerable discussion about Professor Silver's recommendation. Some members shared his viewpoint and others stated that freedom of speech is the overriding principle and should not be abridged in any way. Those expressing the freedom of speech position indicated that removing Jeffries as chair would be interpreted as punishment for his remarks this summer. They strongly upheld the Faculty Senate Resolution of September 19, 1991 which states in its third resolve that "(the Senate) repudiates as incompatible with academic freedom, any attempt, whether originating from inside or outside The College, to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views;". (Appendix VIII) In a conversation with Professor James de Jongh, Chair of the Faculty Senate, I received his interpretation that removal of any one from the chairmanship would be considered a disciplinary action and would be in opposition to the spirit of the Faculty Senate Resolution.

In order to complete my review, I requested a meeting with the full-time voting faculty of the Black Studies

Department. I received the September 25, 1991 Resolution of the Department of Black Studies shortly thereafter. (Appendix IX) As noted in my response dated September 30, 1991 (Appendix X), a meeting with all faculty of the Department was scheduled and subsequently held on Wednesday, October 2, 1991. Attending that meeting were Ms. E. Bain, Mr. S. Cartey, Prof. K. Kiteme, Ms. M. Matias, Mr. C. Powell, Ms. G. Price, Prof. E. Scobie, Ms. C. Yarbrough, Prof. L. Jeffries, Dean Rosen and myself. In response to the question posed above regarding Professor Jeffries' performance of his duties in light of the publicity he is receiving, the faculty members present indicated that he has refused many outside speaking engagements and opportunities in order to perform his duties at the College. In reviewing the specific duties of the chair, as described in Article IX.3 of the Bylaws, the group agreed that he was fulfilling all of them.

They also pointed out Professor Jeffries has been very supportive of the adjunct faculty in Black Studies and through his efforts they have become an integral part of the department. The group asserted that this harmonious arrangement was due to Professor Jeffries' leadership of the department. The press release of September 16, 1991 which was distributed at the Faculty Senate meeting was also given to me at the October 2nd meeting and it declares full support of the chair by all of the faculty in the department. (Appendix XI)

In conclusion, my review of Professor Jeffries' leadership of the Black Studies Department since July 1, 1991, indicates that he is fulfilling the duties of a chair as written in Article 9.3 of the CUNY Bylaws. Evidence gathered from the Dean, the Social Science P&B, and the Black Studies Department indicates that Professor

Jeffries has been responsibly performing those duties delineated, including scheduling courses, presiding over departmental meetings, recruiting faculty, keeping departmental records, representing the department at the P&B, and Faculty Council, etc.

However, there are widespread opinions that the issue of Professor Jeffries' performance can not be evaluated solely on the basis of those duties included in Article 9.3. Professor Silver, for one, in a written statement to me states, "The breaches of professional conduct committed by Professor Jeffries are so very serious that he has thereby disqualified himself from carrying out the duties and responsibilities of academic leader of the Black Studies Department, as defined by the CUNY Bylaws." (Appendix VI)

In Article 9.1 of the CUNY Bylaws, it states that the qualifications of a chair include the capacity ". . . to act effectively as the departmental administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy." (Appendix IIA) These no doubt are essential qualities for positions of leaderwship at the college which you strongly support and enlarge upon in your memo of March 1985, . . . "The City College will not accept in a leadership role any individual whose official actions or statements create the perception that this College supports racial or ethnic bigotry." (Appendix IIB) Your charge to me, however, specifically limits from consideration the ideas that Professor Jeffries has expressed, including his speech in Albany, and thus, has precluded me from investigating these capacities.

I hope that this report, reviewing Professor Jeffries' current functioning as chair, will be useful to you in formulating your final decision in this complex matter.

APPENDIX P

Minutes From The September 19, 1991 Meeting Of The Faculty Senate Of City College

FACULTY SENATE OF THE CITY COLLEGE
MEETING OF SEPTEMBER 19, 1991

Recorded Present: President B. Harleston, Provost R. Pfeffer, Vice President D. Cabezas, Vice President G. McDonald, Vice President J. Yellin, Chief Librarian W. Luguire, Ombudsman B. Sohmer, Registrar T. Jennings, Deans M. de la Nuez, A. Fiellin, M. Marin, B. Morgan, V. Red, C. Watkins; Senators S. Banerjee, J. Barshay, P. Baumel, P. Bobb, V. Box, D. Bushler, C. Cappetti, G. Carro-Kowalcyk, V. Chung, R. Coico, W. Crain, R. Davis, J. de Jongh, S. Derman, V. Diyamandogulu, M. Dorn, C. Evans, R. Grossman, J. Harbeson, D. Horwitz, J. Jiggetts, S. Kelly, N. Kesselschmidt, G. Kranc, S. Lucci, S. Lyon, D. Lytra, K. Malkoff, L. Mantel, N. McKelvie, D. Mintz, B. Newling, B. Popper, E. Rajec, E. Reitz, C. Reidler-Berger, D. Sank, D. Searles, M. Silver, H. Silverstein, A. Sloan, B. Sohmer, E. Starcevic, M. Wallace, S. Wecker, C. Weldon, J. Wilner, I. Yellowitz; F. Vincent, R. Pons.

Excused B. Jenkins, G. Murphy.

Absent: J. Braveboy-Wagner, W. Cotton, J. Johnston, M. Lev, G. Thompson.

Guests D. Morgan, L. Jeffries, W. Cartey, I. Henderson, C. DeCicco, R. Villa, M. Silberberg, P. Zadra, F. Kogut, N. Campbell, A. Bachman, A. Martinez, K. Barthomomew, E. Rios.

Call to Order

The meeting was called to order at 2:14 p.m.

Memorial Resolution

A memorial resolution for Professor Emeritus John Neulinger of the department of Psychology was read by Professor William Crain. (Attached)

The agenda was revised to allow the report from the Nominations Committee to precede the Executive Committee Report.

A motion was made and seconded to permit print media to attend the meeting today.

A motion was made and seconded to permit electronic press, namely Channel 11, to attend the meeting today.
Motion:

For	26
Against	14

The motion carried.

The vote on the motion was as follows:

For	10
Against	22

The motion failed.

A motion was made to accept section 3. The vote was as follows:

For	23
Against	8

The motion carried.

The approved resolution reads as follows:

Whereas, the Faculty Senate on October 20, 1988 adopted a resolution stating in part that "The Faculty Senate recognizes and prizes the rights of a faculty member to express his or her views without restraint"; and

Whereas, in a resolution offered by the Academic Freedom and Faculty Interests Committee and adopted on October 18, 1990 that principle was reiterated, "(notwithstanding that such views may) . . . offend our fundamental notions of human decency and . . . (may be) . . . contrary to the basic ideas upon which City College was founded";

Now, therefore, be it resolved that The City College Faculty, through its authentic voice, the Faculty Senate:

deplores the breach of academic courtesy and decorum in the ethnic slurs used by Professor Leonard Jeffries, Jr. to refer, first, to a colleague and a member of this body, and second, to a larger group of colleagues, in a speech delivered on July 20, 1991 at Empire State Black Arts and Cultural Festival; and

disavows and rejects the abhorrent anti-Semitic and anti-Italian sentiments he has expressed; but

repudiates as incompatible with academic freedom, any attempt, whether originating from inside or outside The College, to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views; and

calls on those who may disagree with the substance of Professor Leonard Jeffries, Jr.'s views to challenge their accuracy and cogency in the free exchange of ideas.

Adjournment

The meeting was adjourned at 5:35 p.m.

Respectfully submitted,
Dottye Seales, Secretary

APPENDIX Q

Excerpts From Transcript Of Testimony Of Chancellor Ann Reynolds – Cross Examination

[734] Gordon in the chairman seat instead of Dr. Jeffries, what impact did the speech have on his ability to function as chair so far as you know?

A. I am not close enough to the situation to give you an opinion on the campus.

Q. So you don't have an opinion, then?

A. With respect to day-by-day function—Dr. Jeffries' day-by-day role on campus—

Q No, I'm interested in the impact of the speech on his ability to function as chair. Now, that was the mandate given to Provost Pfeffer from the president, and I'm sure that mandate was given with your knowledge, wasn't it?

A. Yes.

Q. And you've indicated a series of discussions in meetings with the president and with the provost regarding Dr. Jeffries, so certainly, if that's what the provost and the president were concerned with, they discussed it with you, didn't they?

A. The paramount concern that the president and I repeatedly discussed was the academic well-being of the department and the future of the department in trying to make it into a first-rate department.

Q. All right, then, let's look at that, then. What impact did the speech have on that?

A. The impact which President Harleston referred to [735] was always in the context of Dr. Jeffries' being a department chair and the level of responsibility and administrative viewpoints that viewed in our department chairs.

Q. So you can't identify any impact, then, is that it?

A. It would be necessary for people closer to the campus—they are on the campus—to indicate that to be more specific.

Q. But you can't identify any impact?

A. No, I can't.

Q. Chancellor, you've indicated that you felt the Levin decision was important nationwide regarding freedom of speech. Did you think that it applied to Dr. Jeffries, also?

A. Absolutely.

Q. And why wasn't he protected?

A. He was protected.

Q. In what way was he protected?

A. The—the Levin—the Levin decision by Judge Conboy reaffirms in the academy the right—because it happened in an academic setting—the right of individuals to express their views on any subject, no matter how impalable or difficult they may be for other groups of people, that this is indeed a Constitutionally-protected

* * *

APPENDIX R

Excerpts From Transcript Of Testimony Of President Bernard Harleston – Cross Examination

[1043] students. I was concerned about the enormous reaction of various groups of people. I was concerned about the degree to which these reactions—the reactions or some of the reactions would detract from Prof. Jeffries' role and responsibilities in carrying out the—his duties. I was concerned about the impact of the—these reactions on the college's ability to carry on its job.

Q. Well, let's split that up a little bit. First let's look at Dr. Jeffries and his ability to function as chair.

What impact does or did a thousand letters from politicians have on his ability to continue to function as chair of the Black Studies Department?

A. That's what we sought to find out.

Q. No, I'm asking you to tell me now what impact it had.

A. Well, it's not very clear.

Q. You mean now, as we sit here today, it's not very clear?

A. It's not clear over the long haul. Initially the—the sense—the judgment was that the impact did not affect his ability to carry out his duties.

Q. Well, we know that, we know that, but I'm asking you, from your perspective, as you sit here now—you've had an opportunity to look back over the last year or two, [1044] at all that has develooed, is that correct?

A. Yes.

Q. All right. So I'm asking you to tell us what impact these letters—and I'll add the letters from the politicians, the letters from the various groups, the letters from the

alumni—what impact did any of those letters, did any of the phone calls that you had, what impact did it have on Dr. Jeffries' ability to function as the chairman of his department?

A. Well, though I do not know directly, we saw deterioration in the quality of his performance as chair.

Q. How did those letters, those calls, any contact you might have had with outside sources contribute to or cause that deterioration?

A. I don't know.

Q. But how do you relate them?

A. Well, the only question that I thought we could frame with respect to trying to understand what was happening was to talk in terms of whether—as a result of the reactions and the climate and the whole impact of the speech, whether Prof. Jeffries could continue to conduct —carry out his role as chair of the department.

Q. But as we sit here today, though, you can't relate —there is no cause and effect that you can describe to us, is there?

* * *

[1126] Q. Dr. Harleston, you did two things in this letter. You reported on the results of Provost Pfeffer's review, and you advised him of the action taken by the board of trustees, is that correct?

A. Yes.

Q. And you said, "I continued to be concerned, however, that your past conduct, including your statements to and about professional colleagues, have negatively affected the college, particularly in such areas as staff recruitment"—or "recruitment of faculty and staff, alumni fund raising, and the college's relationship with the business, government, and academic communities."

I'm going to go over those one by one, Dr. Harleston.

Faculty and staff recruitment. As of October 29th, 1991, what proof did you have that Dr. Jeffries' statements had had any impact on faculty and staff recruitment?

A. I'm not sure that I had any.

Q. As of October 29, 1991, what proof did you have that Dr. Jeffries' statement had any impact on alumni fund raising?

A. A number of people had written to indicate that they were withdrawing their pledges or not going to make pledges, and in fact, some stopped their pledges.

[1127] Q. And how much money did you lose as a result of that as of that time?

A. I don't know.

Q. In fact, you didn't lose any money as of that time, did you?

A. Yes, we did.

Q. How could you? All you got was threats.

A. Well, at least in one incident an installment was due—and this just comes to mind—and simply was not made.

Q. How much money was that?

A. I believe in that case 10 or $20,000.

Q. And how much more money in total—and I will give you an opportunity to go forward—did the college lose as a result of Dr. Jeffries' speech?

A. I just don't know the number.

Q. Dr. Harleston, it would seem to me that—

MR. COLUCCI: Would he ask a question instead of telling him what it seems to him, your Honor.

MR. FLEMING: I'm going to ask a question.

THE COURT: Well, yes, Mr. Fleming, if you could avoid subjective comments.

MR. FLEMING: I'll try to do that, your Honor.

THE COURT: Yes.

Q. Dr. Harleston, isn't it true that if you're going [1128] to utilize fund raising as a basis for your action, isn't it true that you should have some facts to back up your conclusions?

A. Yes.

Q. And so I'm asking you whether or not you had any facts as to what the ultimate impact of the speech was on fund raising?

A. I do not have the data, but—

Q. Did you ever have the data?

A. Yes. The development office put data together.

Q. And so what was—

A. I don't know the numbers.

Q. Did you use that data for any reason?

A. We discussed it.

Q. Who's we?

A. The cabinet. It was reported at the cabinet, and the individuals were instructed to try to identify other sources to compensate for—

Q. And did they do that?

A. I don't know.

Q. But that's their job. You're telling me you don't know whether they did that or not?

A. I don't know because they were in the process of doing that when I was leaving.

THE COURT: Just to be clear on this point,

* * *

APPENDIX S

Excerpts From Transcript Of Testimony Of Trustee Stanley Fink – Cross Examination

[1299] participation at the meeting.

Q. All right, now we will go anyway to the question of whether she participated in that discussion about the speech.

A. She did not.

Q. Are you sure she did not, or you don't know whether she did?

A. No, my recollection is—is that it was brought up by one trustee and responded to by the chairman of the board, not the chancellor.

Q. And there was no give and take, no further discussion, after that initial response?

A. The give and take was only grumbling about the decision by Chairman Murphy. That lasted but a moment. He seemed very resolute and very strong on his feeling that it ought not be discussed.

Q. Now, you said that you received some mail regarding Dr. Jeffries and his speech, I guess in reaction to the speech. Was the mail you received in terms of its quantity any greater than the mail you received on any other matter of public interest?

A. I'm sorry, sir?

Q. Was the mail you received regarding Dr. Jeffries any greater in quantity than the mail you would ordinarily receive on any matter of public interest?

[1300] A. You mean as—serving as a trustee now you mean?

Q. Yes, during your tenure as trustee.

A. No.

Q. No. Now, you said that you were not the subject of any political pressure, is that correct?

A. That's correct.

Q. To act one way or another with respect to Dr. Jeffries?

A. That's correct.

Q. Now, you were the speaker of the assembly for how long?

A. Eight years.

Q. And you're saying that none of your old buddies from the legislature called you to talk to you about the Jeffries matter or to advise you as to how you should handle it as a trustee of the university?

Q. Not a single one?

A. Not a sing one.

Q. Are you aware of the fact that the assembly committee—senate committee called Dr. Jeffries—I'm sorry, Dr. Harleston, Chancellor Reynolds, Vice Chancellor Diaz, Vice Chancellor Bloom up to Albany to sit before them and answer certain questions regarding the university?

A. As a matter of fact, not only am I aware of it,

* * *

[1307] last board meeting?

A. He may have. I don't recall having seen it, but he may have, I don't know.

Q. But did he speak to the board about anything in that regard?

A. At that March meeting?

Q. Yes.

A. Not to my recollection. My recollection was that the meeting was about the new person coming in rather than about Dr. Jeffries not being continued.

Q. So no information was provided to you as to whether or not he had performed properly as chair during that period of time?

A. None that I can recall.

Q. Do you think that, in your position as trustee, given the circumstances surrounding Dr. Jeffries, perhaps you should have asked for that information?

A. No.

Q. Not at all?

A. No.

MR. FLEMING: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. COLUCCI: No redirect, your Honor.

THE COURT: Thank you very much, Mr. Fink.

APPENDIX T

Excerpts From Transcript Of Testimony Of Gladys Carrion – Cross Examination

[1196] the actions the board had already taken against him, what was your concern at that time in taking the action you took?

A. We were acting on a recommendation to appoint a chair to the department. There was no discussion. It was a short meeting is my recollection. There was not an extended discussion on—on Prof. Jeffries or the First Amendment or—or anything else. There was a discussion on the qualifications generally of the recommendation that was made by President Harleston at that time to appoint Prof. Gordon.

Q. So all you did, then, was consider putting Dr. Gordon in, but you had no discussion as to what that meant as far as Dr. Jeffries was concerned?

A. I recall a question as to what would happen to Prof. Jeffries, and we were informed that he would continue to be part of the department as a faculty member.

Q. Are you saying that you, as an attorney and as a trustee who may face some personal liability as a result of your actions, was not concerned about or—

MR. COLUCCI: Your Honor, I object to his telling the witness about the possible personal liability in this matter. I think it's threatening and prejudicial and he shouldn't be doing that.

THE COURT: That's nonsense. The objection is overruled. It's an entirely proper question.

Go on.

[1197] Q. So did you, as an attorney, as a trustee, have any concern that your action might generate legal action against the university or against you or against the trus-

tees, that you might have personal liability, didn't you think about that at all?

A. Certainly as a lawyer and as a trustee I'm always concerned about litigation. The university is constantly sued on a variety of issues. And I had to in my own mind be clear that this action was not being taken in response to the speech that was made. And I was confident.

Q. But how could you have been confident or clear if you never even asked a question of Dr. Harleston that might have given you some sight as to his motives?

A. Mr. Harleston—Prof.—President Harleston represented to us that this was his recommendation to appoint Gordon as chair. We relied on that recommendation. He understood what the law was as well as we did.

Q. How do you know he understood what the law was?

A. In the course of our meetings before, he was present. We discussed the First Amendment. We discussed academic freedom. I relied on his ability, on his knowledge, on his expertise that he was making a recommendation to us that was legally appropriate and sustainable.

No. 95-34 (3)

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. LEONARD JEFFRIES, JR.,

Petitioner,

—against—

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

VICTORIA A. GRAFFEO
Solicitor General

ANDREA GREEN
Deputy Solicitor General

JEFFREY I. SLONIM
CLEMENT J. COLUCCI*
Assistant Attorneys General

Of Counsel

* Counsel of Record

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8637

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QUESTION PRESENTED

Whether, upon remand for reconsideration in light of *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994), the Court of Appeals correctly applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to the facts of this case.

PARTIES

The appellee below, Leonard Jeffries, Jr., is the petitioner here.

The following parties were appellants in the court below and are respondents here: Bernard W. Harleston, formerly President of The City College of The City University of New York ("City College"); W. Ann Reynolds, Chancellor of The City University of New York ("The City University"); and James P. Murphy, Edith B. Everett, Herman Badillo, Sylvia Bloom, Gladys Carrion, Louis C. Cenci, Michael J. Del Giudice, Stanley Fink, William R. Howard, Harold M. Jacobs, Susan Moore Mouner, Calvin O. Pressley, and Thomas Tam, members of the Board of Trustees of The City University.

Trustees Murphy, Carrion, Cenci, Del Giudice, Fink, Howard, Mouner, Pressley, and Tam were adjudicated not liable in the district court and participated in the appeals and earlier review in this Court only to seek reversal of the order reinstating petitioner as Chair of the Black Studies Department at City College. Petitioner has since served out the entire term to which he was reinstated and did not seek election to a new term. A new Chair was elected to a three-year term commencing July 1, 1995.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases PAGE

City of Springfield v. Kibbe, 480 U.S. 263 (1987)..... 10

Connick v. Myers, 461 U.S. 138 (1983)..... 11

Perry v. Sinderman, 408 U.S. 593 (1972)..... 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 2, 12

Rankin v. McPherson, 483 U.S. 378 (1987) 12

Tindle v. Caudell, 1995 WL 341529 (8th Cir.)..... 12

United States v. National Treasury Employee's Union, ___ U.S. ___, 115 S.Ct. 1003 (1995) 12

Waters v. Churchill, 511 U.S. ___, 114 S.Ct. 1878 (1994).....2, 5, 7, 11

Statutes

42 U.S.C. § 1983 4

IN THE

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OCTOBER TERM, 1995

No. 95-34

DR. LEONARD JEFFRIES, JR.,

Petitioner,

—against—

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals that petitioner asks this Court to review is reported at 52 F.3d 9 and is reproduced in the Appendix at 1a. The prior opinion of the Court of Appeals, dated April 18, 1994, is reported at 21 F.3d 1238 and is reproduced in the Appendix at 50a. The opinions and orders of the District Court, dated March 31, 1993, April 21, 1993, and May 11, 1993 are reported at 820 F. Supp. 736, 820 F. Supp. 739, and 820 F. Supp. 741 and reproduced in the Appendix at 86a, 82a, and 76a respectively.

STATEMENT OF THE CASE

On remand, the Court of Appeals for the Second Circuit did exactly what this Court directed it to do—it applied the legal standard reaffirmed in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994) and, after conducting the balancing required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), concluded that the potential impact of petitioner's speech on The City University's operations outweighed petitioner's First Amendment interest in that speech. This particular application of settled principles to specific facts raises no issues of general importance beyond the correct determination of a single case. Moreover, there is no conflict among the lower courts on the standard to be applied. Therefore, the petition presents no issue warranting further reeview by this Court.

A. Factual Background

Petitioner was a tenured professor in and Chair of the Black Studies Department at City College.[1] On July 21, 1991, peti-

[1] As will appear, petitioner served out his full term as Chair. He elected not to stand for re-election, and, since July 1, 1995, another member of the Department has served as Chair. Petitioner was and remains a tenured full professor. His status as such was never at issue.

tioner made a speech before the Empire State Black Arts and Cultural Festival in Albany, New York, that was videotaped and later televised. (54a-55a) Although the principal subject matter of the speech was the controversy over efforts, including petitioner's, to develop and implement a multicultural curriculum for New York State's public schools, petitioner devoted much of the speech to personal attacks and slurs against caucasians in general and Jews and Italians in particular. *See* 54a-55a, 78a.

The speech provoked intense public controversy, almost none of it concerning petitioner's views on the multicultural curriculum. Certain respondents issued statements deploring petitioner's remarks, and respondent Bernard Harleston, then President of City College, initiated a review by the Provost to determine whether the controversy surrounding the speech would limit petitioner's effectiveness as Department Chair.[2] After the Provost's review proved inconclusive, President Harleston consulted with Chancellor W. Ann Reynolds. At the October 1991 meeting of the Board of Trustees, they jointly recommended petitioner's appointment to a one-year term in order to allow further consideration of whether petitioner could serve effectively as Department Chair for a full three-year term. (55a-56a) Most of the Trustees concurred in the recommendation. Trustees Edith Everett, Herman Badillo, Blanche Bernstein[3], and Harold Jacobs sought unsuccessfully to deny his reappointment entirely. Trustee Sylvia Bloom, who had also expressed opposition to petitioner's reappointment, abstained. (56a-57a)

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[2] Petitioner had been re-elected by the Department to the standard three-year term as Chair before the controversy over the speech arose. A clerical mishap had, however, prevented the Board of Trustees from acting to confirm his and 15 other department Chair appointments from City College before the summer recess. Those appointments were deferred to the Board's October 1991 meeting. (54a)

[3] Trustee Bernstein died before the trial and was dismissed as a defendant. (6a)

During the next few months, after several instances of misbehavior by petitioner, including angry attacks on faculty colleagues and administrators and a "bizarre tantrum" thrown during an interview with a visiting student, President Harleston decided that the Department needed new leadership after the expiration of petitioner's one-year term. (57a) He recommended the appointment of Edmund Gordon, a nationally-recognized scholar, to fill out the remaining two years of the term to which petitioner had been elected. At its March 1992 meeting, the Board of Trustees unanimously accepted the recommendation. (57a) Dr. Gordon assumed the Chair on August 1, 1992. Petitioner remained a tenured full professor, with no change in salary or benefits.

B. Proceedings in the District Court

Petitioner filed suit in the United States District Court for the Southern District of New York, pursuant to 42 U.S.C. § 1983, claiming that the denial of a full three-year term violated his rights under the First Amendment, the Due Process clause, and New York State law.[4] The case was tried in April and May of 1993.

Shortly before the presentation of evidence was to begin, respondents argued to the District Court that only some of the Albany speech involved matters of public concern and that, therefore, the jury should be asked to determine whether respondents' acts were motivated only by that portion of the speech directed at matters of public concern or, instead, by petitioner's personal abuse of colleagues. The district judge ruled that because most of the speech was concededly about matters of public concern, it did not matter whether respon-

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[4] The state law claims were dismissed before trial. The Due Process claims were dismissed following respondents' motion for judgment notwithstanding the verdict. The dismissal of those claims is not before this Court.

dents reacted only to certain parts of the speech that were not matters of public concern.[5] (82a-85a)

After the close of the evidence, the jury gave its verdict in three rounds of responses to interrogatories. In the first round, the jury determined that: (1) the Albany speech was a substantial motivating factor in the denial of a three-year term to petitioner; (2) petitioner would not have been denied the three-year term but for the Albany speech; (3) the Albany speech had no actual adverse impact on the operations of the Department, City College, or The City University; (4) respondents were, however, motivated by a reasonable expectation that the speech would have such an impact. (76a-77a)

Following that verdict, the District Court performed the balancing required by *Pickering v. Board of Education*, 391 U.S. 563 (1968). The District Court held that respondents were required to show *actual* impairment of government operations before an employee could be disciplined for speech on a matter of public concern, and that a reasonable *expectation* of such harm was insufficient. (76a-81a) Because the jury had found no such actual impairment, the district judge sent the jury a second round of interrogatories to determine which individual defendants would be held liable. (*Id.*)

The jury was asked whether the Albany speech was a substantial motivating factor in the actions of each individual defendant. The jury determined that the actions of nine of the Trustees—James Murphy, Gladys Carrion, Louis Cenci, Michael Del Giudice, Stanley Fink, William Howard, Susan Moore Mouner, Calvin Pressley, and Thomas Tam—had not been motivated by the speech. (60a) Six defendants—Bernard Harleston, W. Ann Reynolds, Edith Everett, Herman Badillo,

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[5] *Waters* has since made clear that "[t]he *Connick* test is to be applied to *the speech for which [the employee] was fired.* An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements." 511 U.S. ___, 114 S.Ct. at 1891 (emphasis added, citations omitted).

Sylvia Bloom, and Harold Jacobs—were found to have been motivated substantially by the Albany speech. (60a)

In a final round of interrogatories restricted to these six defendants, the jury assessed punitive damages of varying amounts against each. (93a-96a) The District Court upheld these determinations on a motion for judgment notwithstanding the verdict. (61a) It also directed that petitioner be reinstated as Department Chair for a two-year term ending June 30, 1995. (*Id.*)

C. The Court of Appeals' Decision

Respondents appealed to the United States Court of Appeals for the Second Circuit seeking reversal of the District Court's judgment or a new trial. Petitioner did not cross-appeal either the jury's finding that respondents were motivated by a reasonable expectation of disruption or the exoneration of the nine Trustee respondents. The Court of Appeals affirmed the District Court's decisions that petitioner's rights were violated, that respondents were not entitled to qualified immunity, and that petitioner should be reinstated. (75a)

The Court of Appeals held, however, that the award of punitive damages was infected by a fatal inconsistency between the jury's finding that respondents' actions were motivated by a reasonable expectation of disruption to City College's operations and its subsequent finding that they acted with malicious intent or reckless disregard of petitioner's rights. (73a) Consequently, the Court of Appeals vacated the punitive damages award and remanded for a new trial solely to determine whether petitioner should recover punitive damages from the six remaining respondents. (75a)

D. Proceedings in This Court

Respondents petitioned this Court for a writ of certiorari on July 18, 1994. On November 14, 1994, the Court granted the

petition, vacated the judgment of the Court of Appeals and remanded for further consideration in light of *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878 (1994). (15a)

E. Proceedings On Remand

On remand, the Court of Appeals called for letter briefs on the application of *Waters* to this case. (16a-49a) On April 4, 1995, the Court of Appeals reversed the judgment of the District Court and directed the entry of judgment for respondents. (1a-14a)

The Court of Appeals read *Waters* to hold that "the government's burden is to make a substantial showing of *likely* interference and not *actual* disruption" in the employer's operations. (10a) Here, the jury determined that respondents had made just such a substantial showing. (11a) Because respondents had made such a showing, the Court of Appeals then had to determine whether "the potential disruptiveness is enough to outweigh the value of the speech." (10a) The Court of Appeals held that, "as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had." (11a)

Ordinarily, this determination would have required the entry of judgment for defendants. (11a) In this case, however, there was still the matter of the inconsistent verdicts. The six defendants found liable had been found *both* to have been motivated by a reasonable fear of disruption and to have been animated by malicious intent to violate petitioner's rights or a callous disregard for those rights. (11a-12a) Because these findings were hopelessly irreconcilable, a new trial would normally have been required. (12a) In this case, however, "elementary principles of causation compel[led] the conclusion" that petitioner's rights had not been violated. (12a) Because the jury had found that at least nine Trustees, constituting a majority of those who voted, had not been motivated by the speech, the Court of Appeals held that the

innocent action of the nine Trustees was a superseding cause breaking the causal chain between the possibly tainted motives of the other respondents and the action taken. (13a) Therefore, no new trial was necessary because the question of the other six respondents' motives would be of only academic interest.

REASONS FOR DENYING THE WRIT

The legal issues raised in the petition are well-settled and recently-reaffirmed by this Court. There is also no conflict among the lower courts about the applicable legal standard. All that is involved here is the particular application of those principles to the specific facts, no longer disputable, of this specific case. Petitioner's arguments—except to the extent that they seem to seek reconsideration of *Waters* and, by extension, the *Pickering* line of cases[6]—rest mainly on a misconception of what the Court of Appeals did and on a claim never pressed below.

Moreover, the lack of practical consequences in this individual case counsels against further review. Petitioner has served out his full reinstated term as Chair despite the Court of Appeals decision and then voluntarily declined to seek reelection to another term. Therefore, whatever this Court might decide, he has no further claim on the Department Chair, mooting any claim for injunctive relief. In addition, petitioner never sought compensatory damages and, given the history of this case, qualified immunity would surely bar an award of punitive damages.

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[6] Such reconsideration appears to be the real argument of petitioner's Point IV. *See* Pet., pp. 24-25.

A. The Court of Appeals Performed the *Pickering* Balancing

Contrary to petitioner's assertion (Pet., pp. 12-13), the Court of Appeals did not "pa[y] only minor lip service to the balancing requirement detailed in *Pickering*, and then ignore[ ] it altogether." (Pet., p. 13) The Court of Appeals twice set forth what the *Pickering* balancing test required (10a, 11a), and specifically concluded "that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech may have had." (11a) The discussion of the balancing process in its April 4, 1995 opinion may have been terse, but the Court of Appeals was by then going over familiar ground. *See* April 18, 1994 opinion, 50a-75a; District Court Order, May 11, 1993, 76a-81a. *See also* District Court Opinion and Order, August 4, 1993 (pp. 27a-82a in July 18, 1994 petition for certiorari). The Court of Appeals was not obliged to restate the entire balancing process in order to apply *Waters* and announce a new result. Petitioner's real complaint is not that the Court of Appeals failed to apply the *Pickering* balancing test, but that it reached the wrong conclusion. The Court of Appeals' fact-specific balancing of the interests in this individual case, however, raises no issue warranting review by this Court.

B. Petitioner Cannot Now Challenge the Jury's Finding That Respondents Had a Reasonable Expectation of Disruption

Petitioner also claims that, largely because the Albany speech took place after-hours and away from the office, and did not involve criticism of his employer or his employer's policies, "[a]ll of the foregoing must lead us to the conclusion that the Respondents had no basis upon which to act." (Pet., p. 17) He claims as well that the ultimate absence of actual harm has some relevance in determining the reasonableness of

the employer's earlier expectations.[7] (Pet., pp. 22, 25) Petitioner suggests, therefore, that the jury's finding that respondents had a reasonable expectation of disruption was unreasonable and not based on evidence. (Pet., p. 15) During the first appeal to the Court of Appeals, however, petitioner had his opportunity to contest the jury's finding but failed to do so. Because the question petitioner now presses upon this Court was neither raised in nor passed upon by the Court of Appeals, petitioner cannot raise it now. *City of Springfield v. Kibbe*, 480 U.S. 263 (1987).

Every fact petitioner now cites was known to the jury, which decided against him.[8] Every argument he now makes could have been made to the jury to help it decide whether respondents' expectations of disruption were reasonable, or to the Court of Appeals to overturn the verdict. Although petitioner complains that "[r]espondents have the benefit of an affirmative defense handed to them which they did not have the burden of having to prove at trial," (Pet., p. 21), respondents *did* prove it to the satisfaction of the jury, and it is now too late to question the basis for the jury's verdict.

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[7] The jury unavoidably considered the reasonableness of respondents' expectations with the knowledge, unavailable to respondents at the time they acted, of actual events. The jury presumably gave such weight as it saw fit to the actual course of events in deciding whether to credit respondents' testimony about their expectations and in assessing the reasonableness of those expectations.

[8] It is simply false, therefore, to suggest that "Petitioner is burdened with the disadvantage of not having had an opportunity to hear and fully respond in the factual record to Respondents' now dominant position, to wit, that it acted based on a reasonable expectation of disruption." (Pet., p. 21) That question could not have been submitted to the jury if it had not been raised at trial and if there had not been evidence in the record sufficient to support a finding on it. If the District Court erred in submitting the question to the jury, petitioner's failure to object then, and, indeed, until now, precludes him from objecting for the first time in this Court.

C. A Government Employer Is Not Precluded From Acting Against an Employee Merely Because the Employee's Speech Occurred Away From Work or Did Not Relate Directly to Work

Petitioner appears to claim that a government employee's speech must occur on the job or directly relate to his employer or employment before an employer can act upon it. (Pet., pp. 15-16) This Court has made clear, however, that a government employer's ability to discipline an employee does not rest on such mechanically-applied considerations. Although the speech in this case was made during the summer rather than during the school year, in Albany rather than on campus, at a function not connected with his employer[9], and did not involve direct criticism of his employer (although it did insult his colleagues), those facts do not preclude an employer from acting on the basis of such a speech.

As this Court explained in *Waters*, the legal test is not whether the speech in question is *related* to the employee's job, but whether it either has an impact on the employer's operations or is reasonably anticipated to have such an impact. *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 1887 (1994); *Connick v. Myers*, 461 U.S. 138, 152 (1983). Petitioner's speech—at least that part of it touching on matters of public concern—dealt with subjects within the realm of his professional expertise, about which he teaches at City College. What an academic department chair says in public about his own specialty, and how he says it, affects the academic reputation of his departmental colleagues and his employer. An academic department chair whose extracurricular remarks embroil him in controversy may find himself too distracted from his administrative duties or discredited in his personal standing with his colleagues to do his job, in contrast to a faculty member, for whom an engrossing controversy over his

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[9] Petitioner was, however, introduced to the audience as the Chair of the Black Studies Department at City College. (54a)

views may simply be proof that he is doing his job. Moreover, City College officials would not have to wait for the damage to be done before they could act.

The rule for which petitioner apparently argues was implicitly rejected by the many cases in which it could have been easily applied but was not. Ardith Rankin's intemperately expressed regrets at the failure of a Presidential assassination attempt, though made in her office during working hours, were not job-related. *Rankin v. McPherson*, 483 U.S. 378 (1987). Robert Perry and Marvin Pickering, though critical of their employers, were speaking on their own time. *Perry v. Sinderman*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968) In *United States v. National Treasury Employee's Union*, ___ U.S. ___, 115 S.Ct. 1003 (1995), the budding Hawthornes, Melvilles, Whitmans, and Cranes who challenged the restriction on writing for fees were, for the most part, concerned with after hours, off-site speech unrelated to their jobs. In none of these cases was the job-relatedness of the speech's location or content a factor warranting more than passing mention. Indeed, even a case that petitioner cites with approval, *Tindle v. Caudell*, 1995 WL 341529 (8th Cir.), shows that off-duty speech unrelated to one's job can be a basis for discipline. Kevin Tindle, a white Arkansas policeman, attended a Halloween party at a Fraternal Order of Police Lodge dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon. For this, he was suspended for 30 days, and the court upheld the suspension.[10]

It is certainly true that speech made on the job and about the job may, generally, have a greater disruptive effect on

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[10] The Eighth Circuit did suggest that because the party was held at the Fraternal Order of Police Lodge it was related to his work. Similar reasoning, however, leads to the conclusion that a speech given by a professor of Black Studies at a conference on Black Arts and Culture on a subject within the scope of his professional expertise is at least as job-related as a party for off-duty police.

government operations than speech made after hours, off-site, and on other subjects, and may, therefore, generally weigh more heavily in the employer's favor in the *Pickering* balancing. However, no decision of this Court has held or even suggested that only speech made on the job or about the job can give rise to a reasonable expectation of disruption sufficient to outweigh the employee's First Amendment rights. Petitioner thus goes too far in suggesting that simply because he spoke on his own time, out of town, and not about his employer "there is a real question as to whether it is legitimate to conclude that such speech, under such circumstances, can be the legitimate concern of the government." (Pet., p. 16) On the contrary, under this Court's precedents there is no such question at all.

Ultimately, petitioner seeks review in this Court either to correct the specific application of undisputed legal principles to facts he can no longer challenge or to reconsider a recent reaffirmation of settled law. Neither issue provides a basis for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8637

VICTORIA A. GRAFFEO
Solicitor General

ANDREA GREEN
Deputy Solicitor General

JEFFREY I. SLONIM
CLEMENT J. COLUCCI*
Assistant Attorneys General

Of Counsel

* Counsel of Record